IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-443

JOSEPH SKILKEN AND COMPANY, ET AL., *Petitioners*

v.

CITY OF TOLEDO, OHIO, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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OPINIONS BELOW

The opinion containing the findings of fact and conclusions of law of the United States District Court for the Northern District of Ohio, Western Division, is reported at 380 F. Supp. 228 and is reproduced in the Appendix at pages 1a-20a. The unreported order of the District Court is reproduced at pages 21a-26a of the Appendix. The first opinion of the Court of Appeals for the Sixth Circuit, reported at 528 F.2d 867, is reproduced at pages 27a-56a. The order of this Court vacating that judgment and remanding the case

to the Court of Appeals is reported at 429 U.S. 1068 and is reproduced at page 57a of the Appendix. The second opinion of the Court of Appeals, not yet in published form, is reproduced at pages 58a-59a.

JURISDICTION

The judgment of the Court of Appeals was entered June 21, 1977. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether proof that the conduct of officials of the City of Toledo and the Toledo City Plan Commission, blocking construction of housing for low income minorities in non-minority areas which has the effect of perpetuating racial segregation, establishes a prima facie case of racial discrimination under the 1968 Fair Housing Act and other federal civil rights laws.

2. Whether proof that, in blocking construction of housing for low income minorities in non-minority areas, municipal officials radically departed, both procedurally and substantively, from their normal decision making process establishes a prima facie case of racially discriminatory intent.

3. If plaintiffs establish a prima facie case of racial discrimination, whether the burden shifts to the governmental defendants to justify their racially discriminatory conduct by a compelling interest.

4. Whether a federal district court, after a finding of unlawful racial discrimination against municipal officials, may order those officials to develop a remedial plan of affirmative action to correct the effects of such discrimination.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the 1968 Fair Housing Act, 42 U.S.C. 3601-3619; other federal civil rights statutes, 42 U.S.C. 1981, 1982, 1983 and 2000d; and the 13th and 14th Amendments to the United States Constitution. The relevant provisions are set forth in the Appendix at pages 60a-62a.

STATEMENT OF THE CASE

This proceeding began on May 28, 1974, arising out of an effort by a developer and a public housing authority to build desperately needed housing for low income minority families in predominantly white areas of the City of Toledo. The plaintiffs are Joseph Skilken and Company (hereinafter Skilken), a developer of residential housing; the Toledo Metropolitan Housing Authority (hereinafter TMHA), a local public housing authority; and low income minority persons on behalf of themselves and all other low income minorities living in Toledo who need decent housing and seek the opportunity to live outside areas of minority concentration in the City. The defendants are the City of Toledo and its officials; and the Toledo City Plan Commission and its members. The case involves the efforts of Skilken to provide 140 units of single family, detached housing under the Turnkey III Homeownership Program[1] on three dispersed sites (Heatherdowns Boulevard, Stateline Road, and Holland-Sylvania Road) in white areas of the City of Toledo. The

[1] The Turnkey III Homeownership Program is a form of low rent public housing under which homeownership opportunities are provided for eligible families.

waiting list for the Turnkey III Program is 70 percent minority.

The efforts of Skilken to construct the housing were blocked by defendant Toledo City Plan Commission through its disapproval of Skilken's application for preliminary platting [2] on the Stateline Road and Heatherdowns Boulevard sites, and rescinding of its original preliminary platting and approval of the Holland-Sylvania site. Further, the City Plan Commission recommended disapproval to the Toledo City Council of Skilken's application for rezoning of the Heatherdowns Boulevard site. On March 26, 1974, the City Council formally denied Skilken's rezoning application.

The plaintiffs claimed that the defendants' conduct was racially discriminatory, in violation of Title VIII of the Civil Rights Act of 1968 and other federal civil rights laws and constitutional provisions.[3] The District Court denied motions to intervene made by the Toledo Branch of the National Association for the Advancement of Colored People (on the side of the plaintiffs) and by property owners (on the side of the defendants) in the Ragan Woods Addition, which is in the area of the Heatherdowns Boulevard site. Trial was had during the week of July 15, 1974. The District

[2] Preliminary platting is a procedure established by the Plan Commission whereby an applicant files a preliminary drawing of the proposed plat of land for development. The drawing shows the design of the subdivision, including the layout of lots, streets, sidewalks, and sewers. The purpose underlying this procedure is to assist developers in resolving any technical difficulties before expending time and monies in preparation of a final plat.

[3] Although the plaintiffs' claim rests primarily upon Title VIII, we also allege a violation of 42 U.S.C. 1981, 1982, 1983, and 2000d, and the 13th and 14th Amendments.

Court filed a memorandum opinion on August 28, 1974, and entered its order on October 8, 1974.

The defendants and applicants for intervention (Ragan Woods homeowners) noticed an appeal to the Sixth Circuit Court of Appeals which reversed the trial court judgment on December 10, 1975. The plaintiffs filed their petition for a writ of certiorari on January 15, 1976, which was granted on January 25, 1977. This Court vacated the December 10, 1975 judgment of the Court of Appeals and remanded the case "for further consideration in light of *Village of Arlington Heights* v. *Metropolitan Housing Development Corp., ante,* p. 252, and *Hills* v. *Gautreaux,* 425 U.S. 284 (1976)." 429 U.S. 1068 (1977). On remand, the Court of Appeals reaffirmed its earlier rulings, filing a per curiam decision on June 21, 1977.

The facts on which this Petition is based are contained in the record made at trial. Most of the facts are succintly set forth in the District Court's opinion.[4] In the course of its opinion reversing the judgment of the District Court, the Court of Appeals ignored certain key facts found by the lower court and expressed some disagreement with certain of the trial court's conclusions. The appellate court, however, did not purport to hold the District Court's findings clearly erroneous. Plaintiffs will note those areas of disagreement in this Statement of the Case, with appropriate references to the record.

[4] Other facts adduced at trial are contained in the Appendix in the Court of Appeals and the Plaintiffs' Exhibits which are part of the trial record. References to the Court of Appeals appendix are referred to as "App." References to Plaintiffs' Exhibits in the trial record are referred to as "Pl. Ex."

1. Toledo is a Racially Segregated City

The District Court made the basic finding that "the City of Toledo is a racially segregated city with minority groups heavily concentrated in limited sections of the City known as the 'Southwest Corridor,' or the 'Black Corridor' ". A. 6a. According to uncontroverted testimony, not more than five percent of the minority population resides outside the "Black Corridor," App. 159, a phenomenon that plaintiffs' expert witness characterized as statistically unnatural.[5] App. 104.

2. The Racial Segregation is the Result, in Large Part, of Discriminatory Practice, Both Private and Public.

Another basic finding of fact by the District Court was that among the forces which have brought about the segregated housing pattern in Toledo was racial discrimination, including racial steering by real estate brokers and discrimination by mortgage lending institutions.[6] A. 6a. The District Court also found that

[5] The Court of Appeals' statement that "black families are living in virtually all parts of Toledo," A. 47a, in no way contradicts the undisputed testimony that at least 95 percent of the minorities are confined to the "Black Corridor." Surely, this stark statistic, as well as other uncontroverted evidence, supports the District Court's findings that Toledo is racially segregated. Further, the Court of Appeals did not purport specifically to hold that the District Court's findings in this regard were "clearly erroneous." as required by Rule 52(a) of the Federal Rules of Civil Procedure.

[6] The Court of Appeals agreed that there has been private discrimination in Toledo, but questioned whether any such discrimination occurred after 1968. The Court of Appeals asserted:

> [M]ost of [the private discrimination], we believe, occurred prior to Ohio's Civil Rights Act, Ohio Rev. Code § 4112.01 *et seq.*, and the decision of the Supreme Court in *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409 (1968). . . . A. 52a.

The appellate court offered no factual support for its remarkable assertion that enactment of a state fair housing law and this

these forces are still at work. *Id.* The record also shows that governmental agencies, including the defendant City of Toledo, participated in establishing and perpetuating residential segregation in the City. For the most part, these actions centered around the provision and location of low rent housing under the Public Housing Program, the program which provides the focus of this litigation.

Until 1953, the Toledo Metropolitan Housing Authority (TMHA), a plaintiff in this action, followed an avowed policy of racially segregated public housing in the City. In that year, THMA proposed to integrate its public housing developments. As the record shows, members of the City Council, under great pressure from residents of white areas of the City, opposed TMHA's change of policy. App. 746, 755. While the City Council later rescinded its disapproval, the U.S. District Court for the Northern District of Ohio, Western Division, ultimately ordered TMHA to implement its proposed integration policy. *Vann* v. *TMHA*, 113 F. Supp. 210 (N.D. Ohio 1953).

The District Court found that even after the *Vann* decision, TMHA, through selection of sites for the construction of family public housing, contributed significantly to the City's segregated housing patterns. A. 7a. The City was a participant with TMHA. Through its consistent disapproval of family public

Court's 1968 decision in *Jones* automatically eliminated housing discrimination as a problem in Toledo. The persistence of housing discrimination in the country's cities and metropolitan areas has been fully documented on numerous occasions. See, e.g., U.S. Commission on Civil Rights, ***Twenty Years After Brown: Equal Opportunity in Housing*** (1975). As the next sentence in the text shows, its continued existence in the City of Toledo was established by uncontroverted evidence presented at trial.

housing sites in predominantly white areas, the City assisted and participated with TMHA in creating and perpetuating the City's segregated housing patterns.

In recent years, TMHA has actively sought to promote racially integrated housing. The City has consistently sought to block these efforts and has failed to fulfill its own equal housing opportunity obligations. In 1970, the City Council, under great pressure once again from area residents, disapproved the location of Turnkey public housing (the same kind of housing involved in this suit) on four sites in predominantly nonminority areas of the City. Pl. Ex. 126. Subsequent to this action, the U.S. Department of Housing and Urban Development (hereafter HUD) found the City Council's conduct in violation of federal civil rights laws, and, as a consequence, suspended the payment of federal monies allocated to the City. App. 722-724; Pl. Ex. 78. Simultaneous with this HUD action, the U.S. District Court for the Northern District of Ohio, Western Division, enjoined the City Council from taking any action which would interfere with the selection of those four sites. *Davis* v. *City of Toledo*, 54 F.R.D. 386 (N.D. Ohio 1970).

In 1973, the City was again put on notice that it was perpetuating existing patterns of racial segregation through its failure to provide equal housing opportunities and to comply with federal equal opportunity requirements. In that year, HUD found: "The basic Equal Opportunity Requirements . . . have not been implemented [by the City]." App. 733. HUD also found: "Necessary action to alter the pattern of racial concentration in various areas of the City has not been taken, nor has affirmative action to promote open housing within City boundaries." *Id.* That finding was

confirmed by the Director of the City's own Department of Community Development, who testified that the City has not performed as well in the area of equal opportunity as it should. App. 356.

Thus, uncontroverted evidence shows that the segregated housing patterns that exist in the City of Toledo, result, in large part, from racially discriminatory housing practices, and that the defendant city of Toledo, through action and inaction, has substantially contributed to the existing residential segregation.[7]

3. Effects of Residential Segregation in Toledo.

The racially discriminatory practices which have created and perpetuated Toledo's racially segregated housing patterns have not only denied minorities equal housing opportunities, but have also denied minorities equal educational opportunities and markedly restricted their access to standard housing.

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[7] The Court of Appeals, while it ignored this uncontroverted evidence, did not appear to contradict it. At one point, the Court stated: "Members of the City Council did not cause nor create the concentration of black people in Toledo . . ." A. 52a. To the extent the Court believed that the Council members were not *solely* responsible or that all of the present members are not blameworthy, it is correct. The petitioners do not claim, nor need they, that the racial residential patterns of Toledo were created entirely by City officials. At most, we need only prove, as the record amply demonstrates, that the patterns "were in any significant measure caused by governmental activity." *Milliken* v. *Bradley*, 418 U.S. 717, 756 n.2 (1974). (Stewart J. concurring). And the "governmental activity" may be that of the defendants or any other officials. *See Gaston County* v. *United States*, 395 U.S. 285 (1969). To the extent the Court of Appeals' statement reflects the belief that the City Council in no way contributed to the racial residential patterns, it is in total conflict with the evidence.

Toledo's segregated housing patterns are reflected in the racial composition of its public schools. The District Court found: "As a result of the segregated housing pattern in the City there is a great disparity in the racial composition of both elementary schools . . . and high schools . . ." A.6a n.9. Statistics introduced at trial show that 70 percent of the black elementary students enrolled in the Toledo Public School district attend an elementary school which is 75 percent or more black. In sharp contrast, the Washington Local School District, which serves the northerly and northwesterly portions of the City, has only 25 black students out of a total enrollment of 11,401 pupils. App. 715-716, 718-719.[8]

In addition to segregating Toledo's public schools, the City's racially discriminatory practices, by confining minorities to the "Black Corridor," have also resulted in markedly restricting minority access to decent, safe, and sanitary housing. Evidence introduced at trial showed that there is a positive correlation between minority housing patterns and poor housing quality and that minorities have been confined to cheaper, older homes. App. 103-104, 775, 777-789.

4. Public Housing in Toledo is Perceived of, and is in Fact, a Minority Housing Program.

According to uncontroverted testimony at trial, Toledo residents, including officials of the defendant Toledo City Plan Commission, perceive public housing as

[8] Children residing in the public housing developments which are at issue in the present case would attend predominantly white schools in the Maumee, Washington Local, and Toledo Public School Districts. A. 7a; App. 424, 715-721.

a program that serves mostly racial minorities.[9] App. 362, 242-243,493. This perception is based in fact. The record shows that 70 percent of the low income families who reside in family public housing in Toledo are minorities. Further, 70 percent of the applicants on TMHA's waiting list for family public housing are minorities. And 50 percent of the minority population is eligible for public housing. A. 8a. Finally 70 percent of those persons accepted into the Turnkey III Homeownership Program (those who would be afforded the opportunity to move into the Skilken homes) are minorities. App. 714. The District Court, on the basis of these statistics, drew the "inescapable conclusion" that "decisions regarding public housing disproportionately affect minority groups."[10] A. 8a.

[9] For example, the then Chairman of the defendant City Plan Commission testified that it was his understanding that more blacks than whites lived in public housing. He also admitted in the course of his testimony that he has characterized public housing residents as being "dirty, lazy, and shiftless." App. 243.

[10] The Court of Appeals, in its statement of facts deemed relevant to its decision, inexplicably ignored these important statistics and chose instead to focus solely on statistics relating to persons eligible for public housing, regardless of whether they had applied or otherwise expressed any need or interest. According to these statistics, of the 35,000 Toledo households eligible for public housing, 79 percent were white and 21 percent were black. A. 47a. The appellate court concluded that "there are more than three times as many whites who need public housing than there are blacks needing housing." *Id.* The Court of Appeals, however, did not purport to hold that the District Court's finding on the racial impact of the defendants actions was "clearly erroneous" as required by Rule 52(a).

5. The Need for Low Income Housing in Toledo is Critical, and Particularly Acute for Minorities.

The record shows that there are approximately 20,000 substandard units in the City, App. 738, and that the vacancy rate for standard low and moderate income housing is less than two percent, considered "critical" by HUD. App. 317-318. The record also shows that 40 percent of the City's low and moderate income population live in sub-standard housing and that 75 percent of these inadequately housed people are minorities. App. 319, 739.

Actions by the City have exacerbated the housing problems of the poor, and particularly the minority poor. Since 1968, the City's Neighborhood Development Program has been responsible for the demolition of approximately 2,900 units of housing in predominantly black areas of the City. App. 327. Fully 90 percent of those persons who have been displaced and relocated since 1968 as a result of the City's demolition activities have been black. App. 729-730. Despite a federal requirement that the City assure that all units that are demolished be replaced, little more than half of the 2,900 demolished units have, in fact, been replaced. App. 326-327.

HUD has criticized the City for its failure to take aggressive action in making low income housing units available and urged the City to "take immediate and sustained action to assure that housing needs of low income families and individuals are being met." App. 728. According to undisputed testimony at trial, at the very time the defendants were blocking construction of the Skilken homes, the City was including these same units in a Workable Program proposal for additional HUD funding. App. 343-345, 743. As the District Court found:

> This creates a situation whereby the City seeks funds for construction of public housing and then turns around and rejects the proposals of the developer which would implement its stated policy. A. 16a n.19.

6. The Skilken Proposal

The Skilken Proposal called for construction of 140 units of single family detached houses on four sites dispersed throughout the City, outside the "Black Corridor." The units were to be constructed under the Turnkey III Homeownership Program. The waiting list for this program in Toledo is 70 percent minority. Under the Skilken proposal, 50 units were to be constructed on Heatherdowns Boulevard, in a subdivision to be named Denver Terrace; 46 units were to be constructed on Holland-Sylvania Road, in a subdivision to be named Chesterfield Heights; 34 units were to be constructed on Stateline Road and Lewis Avenue, in a subdivision to be named Statlin Terrace; and ten units were to be constructed on scattered lots on Tecumseh Avenue.[11]

The housing units to be constructed on these sites are to be of high quality. Pl. Ex. 185, p. 22. Further, Skilken is an experienced builder of excellent reputation and proven reliability. App. 708-709. Construction costs are estimated at $30,000-$35,000 per unit, as high or higher than the average price of houses in the areas

[11] The Tecumseh Avenue units are not at issue in this case, since no approval by the City Council or Plan Commission is necessary.

in which the Skilken houses were to be constructed. App. 681, 699."

In the process of selecting the above sites, Skilken was obliged to conform to Plan Commission and TMHA policies. Because of the high concentration of minorities and the abundance of low income subsidized housing in the "Black Corridor," the Plan Commission Staff has developed a policy of discouraging the construction of such housing in the "Black Corridor." App. 106-109, 136-138, 161, 190-194, 209, 214. Similarly, TMHA, pursuant to HUD directives, requires that sites be located outside areas of minority concentration. App. 382-383.

The record shows that there are only 950 acres of land in Toledo available for the development of low and moderate income housing outside the "Black Corridor". App. 790. Skilken had to search for approximately two years to find sites which conformed to TMHA and Plan Commission site selection policies, examining some 40 different locations. In the process, Skilken worked closely with TMHA and Plan Commission staff to assure that they conformed to the policies of those agencies. Several sites were specifically rejected by Plan Commission staff because they were near areas of minority concentration. App. 106-107, 192-194.

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[12] For example, in the Stateline area, the average price of homes was only $21,500. App. 681. In the Heatherdowns community, the average price was $30,500. App. 699. Ragan Woods, whose property owners sought to intervene, is a part of the Heatherdowns community. Although the price of houses in Ragan Woods is considerably higher, the fact remains that the cost of Skilken homes was entirely consistent with the cost of homes generally in the community of which they were to be a part.

Skilken's acquisition of the Heatherdowns, Stateline and Holland-Sylvania sites was a direct result of recommendations by members of the Plan Commission staff. App. 194-195, Pl. Ex. 185, pp. 85-86. The three sites are located in different areas of the City and all are in areas that are nearly all-white. At trial, the Plan Commission's Deputy Director testified that these sites "were the best sites we had seen so far in the Turnkey project process." App. 110. Specifically, this official testified that they were good sites because they were in areas which contained no concentration of minorities or low income housing and the number of units on each site was sufficiently small so that they would not in any way impact the area. App. 110-111.

Before construction could begin on the three sites, Skilken was required to secure preliminary platting approval [13] from the Plan Commission and approval for a zoning change from the City Council for the Heatherdowns site.[14] Plan Commission staff members testified that the staff found no technical problems whatsoever with any of the three sites and recommended that the Plan Commission approve all three sites. App. 114, 132-133, 201-204, 683-686, 689-691, 701-702(a); Pl. Ex. 26. Specifically, the Plan Commission staff found no school, traffic, sewer, drainage, or fill problems connected with the three sites. App. 132-133, 201, 204.

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[13] See note 2, *supra*.

[14] Petitions for a change of zone are first filed with the Plan Commission which makes a recommendation to the City Council. After receipt of the recommendation, the City Council conducts a hearing and acts on the application.

Uncontroverted evidence introduced at trial showed that when the Plan Commission staff recommends approval of preliminary platting applications, the Plan Commission "almost never" overrules, and "overwhelmingly" follows the recommendation. App. 133. Uncontroverted evidence also showed that when the Plan Commission staff recommends approval of an application for a residential zoning change, the Plan Commission overwhelmingly follows their recommendation, and that it is considered "unusual" when they do not. App. 134. At trial the then Plan Commission Chairman, a member of the Commission for 37 years, could not recall any specific instances in which the Plan Commission had not followed the staff recommendation regarding the approval of a platting or rezoning application. A. 11a. The current Chairman, who has been a member of the Plan Commission since 1963, similarly could not recall any instances when approval of platting or rezoning had been denied by the Plan Commission after the staff had recommended approval. App. 440-444.

(a) Disapproval of the Preliminary Platting of the Stateline Road Site

On January 24, 1974, the Plan Commission conducted a hearing on Skilken's application for preliminary platting of the Stateline Road site. At this hearing, white residents living near the site expressed opposition to the platting on grounds that there was fill material on the site and that it did not drain properly. Additional soil boring tests conducted by licensed engineers and an independent investigation by the Plan Commission staff showed that there were no drainage

or fill problems. Accordingly, the staff recommended approval. App. 40-41, 116-118, 132-133, 223-224, 303-307, 688. The Plan Commission held three separate hearings on Skilken's preliminary platting application for the Stateline Road site. At the conclusion of the three hearings, on March 7, 1974, the Plan Commission disapproved Skilken's preliminary platting application on the ground that "it was not considered to be in the best interests of the residents in the area." App. 687.

A Plan Commission staff member, employed by the Plan Commission for more than 12 years, testified that he did not know of any instance in which a plat had been disapproved for that reason. App. 224. The then Plan Commission Chairman and its current Chairman testified that in making their decision they relied upon the opinion of a white resident of the area rather than the professional opinions of the licensed engineers and the Plan Commission staff. App. 255, 287, 481-482. The District Court found: "No competent fact finder could properly have given any credence to the exaggerated and distorted memories of so unabashedly interested a witness . . . against the scientific evidence which contradicted it." A. 15a.

(b) Disapproval of the Preliminary Platting of the Holland-Sylvania Site.

On January 24, 1974, the Plan Commission held a hearing on Skilken's request for approval of the preliminary platting of the Holland-Sylvania site and unanimously approved Skilken's application. App. 508-512. Later, white residents of the area surrounding this site requested the Plan Commission to reconsider this action and rescind its prior approval of the platting.

On March 21, 1974, contrary to staff recommendation, the Plan Commission rescinded its prior approval on the basis that it had not known that public housing was to be built on the site. App. 646-652, 695. The Commisison's present Chairman, then a member, in response to the question of whether the approval would have been rescinded had it not been public housing, stated, "Probably not. I think that's inescapable. Probably not." A. 11a. When asked at the Plan Commission meeting whether he had ever rescinded such a matter as this, the then Chairman of the Plan Commission responded: "Never." App. 652. A longstanding Plan Commission staff member testified at trial that he knew of no instance in the past in which the Plan Commission had rescinded a previous approval. App. 205.

(c) Disapproval of the Preliminary Platting and Rezoning of the Heatherdowns Boulevard Site.

The Plan Commission held two hearings regarding the Heatherdowns Boulevard site, the first to consider Skilken's application for a zoning change from R-A (20,000 square feet) to R-2 (6,000 square feet), and the second to consider both the rezoning and platting applications. At the second hearing, Skilken's counsel suggested that Skilken was willing to amend the rezoning application from R-2 (6,000 square feet) to R-1 (9,000 square feet). App. 130-132. Skilken later acquired additional land and amended its rezoning application to R-1. App. 225, 705. At both hearings, white residents of the surrounding area opposed approval of Skilken's applications because public housing was to be constructed on the site. At the second meeting, the Plan Commission passed a resolution recommending that Skilken's rezoning request be disapproved because

it was inconsistent with the neighborhood. The Plan Commission also disapproved Skilken's application for preliminary platting. App. 589-617. Again, these disapprovals were in the face of staff recommendations to the contrary.

On March 19, 1974, the Toledo City Council held a hearing on Skilken's rezoning request. White residents of the area again expressed opposition to the rezoning on the basis that public housing would be constructed on the site. The City Council denied the request and formalized that action on March 26, 1974. App. 653.

The Heatherdowns site and the surrounding area were annexed to the City of Toledo in the middle 1960's and were zoned R-A (20,000 square feet), the highest residential land use in the City. The Plan Commission's Deputy Director testified that the area "began to experience a transition from rural uses to suburban uses" and is presently under "heavy development pressure." App. 121, 127, 195-196. As the District Court found, the site is in what has been characterized as a "holding status" with rezoning contemplated in the near future. A. 11a; see App. 121, 167, 195, 224-225. The District Court also found: "The record is . . . replete with rezoning changes in the Heatherdowns area from R-A to various other residential and commercial uses." A. 11a. Further, the record shows that non-public housing developers who have requested these changes have no difficulty in having them approved. App. 119-131; Pl. Ex. 85-103, 796, 797. In fact, the area immediately adjoining the Skilken site is currently zoned R-3 (multi-family/2,400 square feet). App. 702(a). The Ragan Woods subdivision, itself, is currently zoned R-B (12,000 square feet). *Id.*

Plan Commission staff members testified at trial that the staff expected the Heatherdowns Boulevard site eventually to be rezoned to R-3 (multi-family/ 2,400 square feet), App. 125-127, 225-226, and that the staff had recommended a rezoning to R-2 in order to protect the single-family character of the area closely surrounding the site. App. 126-127, 701-702(a). There is also uncontroverted testimony by a Plan Commission staff member that the Plan Commission's rejection of Skilken's request to rezone the Heatherdowns Boulevard site to either R-1 or R-2 was totally inconsistent with its past history, customs, and practices. App. 226.

The current Plan Commission Chairman, then a member, testified that he was opposed to placing public housing in the Heatherdowns area because there was hostility from neighbors in that area. App. 492-494. When asked whether or not the hostility was racial, he responded: "Certainly, a part of it." App. 494.

7. Summary of Facts

The facts that form the basis of this Petition can be summarized as follows:

(a) The City of Toledo is racially segregated as a result, in large part, of discriminatory practices.

(b) Governmental agencies, including the defendant City of Toledo, have participated in establishing and perpetuating residential segregation in the City, mainly through the location of low rent public housing.

(c) Toledo has a critical need for low income housing, particularly for minorities.

(d) Approximately 70 percent of the people who live in public housing and those who are on the waiting list for family public housing (including Turnkey III) are minorities.

(e) Toledo has a severe shortage of land outside areas of minority concentration for the development of public housing.

(f) The three sites for the Skilken Turnkey III units are located outside areas of minority concentration and were acquired in response to TMHA and Plan Commission policies requiring that public housing sites be located outside such areas.

(g) Prior to the Skilken denial, the Plan Commission had never disapproved requests for plattings for residential developments when the technical requirements were met. The plattings submitted by Skilken met all the technical requirements.

(h) In the entire history of the Toledo City Plan Commission, the Skilken proposal for the Holland-Sylvania site is the only occasion on which the Plan Commission has rescinded a prior platting approval.

(i) In the past Toledo officials have rejected low income housing in white areas in response to protests by white residents of such areas. In the instant case, white area residents vigorously opposed platting of the three sites and rezoning of the Heatherdowns site after they learned that public housing was to be constructed.

(j) Many requests have been submitted for rezoning in the Heatherdowns area from R-A (a "holding zone") to various other residential and commercial uses. Until the Skilken proposal, these requests

have been granted with no difficulty. The Skilken proposal would have further ensured the single-family character of the neighborhood.

(k) The staff of the Plan Commission recommended approval of all three plattings and the one rezoning request. Nevertheless the Commission overruled those recommendations. In the past whenever the staff recommended approval of a residential zoning change or plat, the Commission "overwhelmingly" followed those recommendations.

(l) The Plan Commission staff, composed of professional planners, found that all technical objections (i.e., flooding, traffic congestion, school overcrowding, drainage, sewer, and fill problems) were satisfied and that none had any merit.

8. Rulings Below

On the basis of these facts, the District Court ruled that the plaintiffs had met their burden of establishing a prima facie case of racial discrimination. First, it found that the evidence, taken as a whole, showed that the defendants' conduct was racially motivated. Second, it found that, apart from the question of motivation or intent, the effect of the defendants' actions was racially discriminatory. A. 11a-12a.

Having thus held that the plaintiffs had met their burden of establishing a prima facie case of racial discrimination, the Court examined the justifications offered by the municipal defendants for their conduct to determine whether the discrimination had been necessary to serve some compelling governmental interest. The City offered the following reasons for its decisions: that TMHA's past record was poor; that the

Skilken proposal for the Heatherdowns site was not beneficial for the neighborhood; that the Stateline site had flooding problems; and that all three sites involved cluster housing developments. The District Court found these objections either unsubstantiated by the evidence or "devoid of the requisite 'compelling' nature." A. 16a. On October 8, 1974, the District Court entered an order requiring the defendants, among other things, to design a comprehensive plan affirmatively to "eliminate discriminatory barriers in the total housing supply. . . ." A. 24a.

On appeal by the defendants and applicants for intervention (neighboring property owners), the Court of Appeals reversed the judgment of the District Court. First, it overturned the finding of racial discrimination, even though it did not hold that the District Court's findings were "clearly erroneous," as required by Rule 52(a). Second, the Court of Appeals held that the defendants need only show a rational basis (not a compelling reason) for their actions and that the lower court had given insufficient weight to the proffered non-racial justifications. The Court of Appeals said:

> We live in a free society. The time has not yet arrived for the courts to strike down state zoning laws which are neutral on their face and valid when passed, in order to permit the construction at public expense of large numbers of low cost public housing units in a neighborhood where they do not belong, and where the property owners, relying on the zoning laws, have spent large sums of money to build fine homes for the enjoyment of their families. A. 52a.

Finally, the Court of Appeals ruled that the District Court, in ordering affirmative relief to eliminate the past and continuing effects of racial segregation, exceeded its authority.[15]

On January 15, 1976, the plaintiffs filed their petition for a writ of certiorari. This Court granted that petition on January 25, 1977, vacated the judgment of the Court of Appeals, and remanded the case "for further consideration in light of *Village of Arlington Heights* v. *Metropolitan Housing Development Corp., ante,* p. 252, and *Hills* v. *Gautreaux,* 425 U.S. 284 (1976)." 429 U.S. 1068 (1977). On remand, the Court of Appeals summarily reaffirmed its earlier decision. In so ruling, the Court of Appeals, without discussion, announced that its earlier decision was consistent with both *Arlington Heights* and *Gautreaux.* Indeed, the Court stressed, without discussion, that, "[i]f the opinion of the Supreme Court in *Arlington Heights* had been available . . ., we would have cited it as the principal authority in support of our decision." A. 58a. Similarly, the Court, again without discussion, concluded that *Gautreaux,* a case involving solely the issue of relief, was consistent with its earlier decision in *Skilken* because the alleged violation in *Skilken* "related to refusal . . . to approve preliminary platting . . . and refusal . . . to rezone . . . ." A. 59a.

The Court of Appeals' decision on remand, although cryptic and without benefit of analysis, appears to rest on the following legal grounds:

[15] In addition the Court of Appeals ruled that the motion for intervention by the Ragan Woods property owners should have been granted. The plaintiffs do not challenge that ruling in this petition.

(1) Plaintiffs' burden of proof under Title VIII, the principal basis for the *Skilken* litigation, is to show that the purpose or motivation of the challenged municipal conduct was racially discriminatory.

(2) Plaintiffs did not establish a racially discriminatory purpose or motive, according to the standards set forth in this Court's decision in *Arlington Heights.*

(3) Even if the defendants' conduct was racially discriminatory, the District Court had no authority, under this Court's decision in *Gautreaux,* to order them to engage affirmatively in "substantial efforts to eliminate discriminatory barriers in the total housing supply" within the City of Toledo. A. 24a.

These rulings create a serious conflict among the circuits in the interpretation of Title VIII and are inconsistent with applicable decisions of this Court. Based upon this conflict and inconsistency, the plaintiffs petition this Court for a writ of certiorari to review the judgment below.

REASONS FOR GRANTING THE WRIT

The petitioners contend that the Court of Appeals, in reaffirming its earlier decision reversing the District Court, misinterpreted this Court's remand order and implicitly imposed a strict standard of proof under Title VIII that conflicts sharply with the decisions of other courts of appeals. The Court of Appeals' summary reaffirmance was also inconsistent with this Court's recent decision in *Arlington Heights,* which was a principal basis for this Court's vacating the earlier judgment of the Court of Appeals and remanding the *Skilken* case to that Court for further consid-

eration. Furthermore, the opinion below conflicted with other applicable decisions of this Court under a closely related civil rights statute, Title VII (employment) of the Civil Rights Act of 1964. With respect to the equitable authority of the District Court to order the defendants to develop a remedial plan, the Court below also misinterpreted this Court's decision in *Gautreaux*, specifically referred to in the remand order.

A. Conflict Among the Circuits

The primary question presented by this petition is the appropriate standard of liability under the Federal civil rights laws, particularly the Fair Housing Act (Title VIII of the Civil Rights Act of 1968), in reviewing racially discriminatory land use decisions by municipal officials.[16] This Court expressly reserved decision on that issue in *Village of Arlington Heights* v. *Metropolitan Housing Development Corp., supra.* Four courts of appeals, however, including the Court below, have ruled on that precise question. Three of the circuits have agreed with the District Court in this case, adopting the view that a municipality violates Title VIII upon a showing of the discriminatory effect of its actions, without regard to "intent" or "purpose." *United States* v. *City of Black Jack,* 508 F.2d 1179

[16] Since the passage of Title VIII in 1968 this Court has fully reviewed only two cases interpreting that statute. The first case involved the standing of white and non-white residents of an apartment complex to challenge its allegedly discriminatory practices. *Trafficante* v. *Metropolitan Life Insurance Co.*, 409 U.S. 205 (1972). In the course of its decision in *Trafficante*, this Court noted "the enormity of the task of assuring fair housing," *id.* at 211, and stressed the need to accord Title VIII "a generous construction." *Id.* at 212. The second case raised the question whether a defendant in a Title VIII suit is entitled to a jury trial when damages are claimed. *Curtis* v. *Loether,* 415 U.S. 189 (1974).

(8th Cir. 1974), *cert. denied,* 422 U.S. 1042 (1975); *Metropolitan Housing Development Corp.* v. *Village of Arlington Heights,* —— F.2d —— (7th Cir. July 7, 1977): *Resident Advisory Board* v. *Rizzo,* —— F.2d ——(3rd Cir. Aug. 31, 1977). Thus the Sixth Circuit's reversal of the District Court on this issue and its subsequent reaffirmation of that reversal stand in sharp conflict with the other circuits.

The Sixth Circuit's rejection of the District Court's effect oriented standard of liability directly conflicts with the decision of the Eighth Circuit in *United States* v. *City of Black Jack, supra.* The structure of the Court's analysis in *Black Jack* was very similar to that of the District Court in the instant case. The Eighth Circuit explicitly adopted the concept of the prima facie case under Title VIII:

> To establish a prima facie case of racial discrimination, the plaintiff need prove no more than that the conduct of the defendant actually or predictably results in racial discrimination; in other words, that it has a discriminatory effect. *Id.* at 1184.

Indeed, the Government contended in that case that the challenged conduct had a racially discriminatory purpose. But the Court, while agreeing that there was evidence to support this contention, emphasized that under Title VIII: "Effect, and not motivation, is the touchstone. . ." *Id.* at 1185.[17]

[17] That effect, not intent or purpose, is all that needs to be proved under Title VIII is underscored by the provision in the statute requiring recipients of federal funds to "administer the programs and activities relating to housing and urban development in a manner *affirmatively* to further the policies" of the Federal Fair Housing Act. 42 U.S.C. 3608(d)(5) (emphasis added). See *Otero*

Applying that concept of the prima facie case doctrine, the Court of Appeals held that the plaintiffs had met their burden of proof by showing: (1) that blacks were disproportionately over-represented among the intended beneficiaries of the project; (2) that patterns of racial residential segregation, caused at least in part by discrimination, pervaded the St. Louis metropolitan area, in which Black Jack is located; and (3) that passage of the municipal ordinance, by foreclosing 85 percent of the black population in the St. Louis area from residing in Black Jack, would perpetuate racial segregation.

The justifications offered by the City in *Black Jack* were also very similar to those offered in the instant case. They were: (1) road and traffic controls; (2) prevention of overcrowding in schools; and (3) prevention of devaluation of adjacent single family homes. 508 F.2d at 1186. The Eighth Circuit, applying the compelling state interest test, rejected them as irrelevant or insubstantial, as did the District Court in *Skilken*.

In its opinion on remand from this Court's decision in *Arlington Heights, supra,* the Seventh Circuit Court of Appeals also adopted an effect oriented standard under Title VIII. It held that claims of racial discrimination based on that statute "can be established by a showing of discriminatory effect without a showing of discriminatory intent".[18] Slip Op. at 10.

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v. *New York City Housing Authority,* 484 F.2d 1122 (2d Cir. 1973); *Shannon* v. *HUD,* 436 F.2d 809 (3rd Cir. 1970); *Resident Advisory Board* v. *Rizzo,* 425 F. Supp. 987 (E.D. Pa. 1976), *aff'd on other grounds,* —— F.2d —— (3rd Cir. Aug. 31, 1977). Since passage of Title VIII, Toledo has received millions of dollars in federal funds for such programs.

[18] The Seventh Circuit did not, however, adopt a per se rule that

Applying that standard to the facts in *Arlington Heights,* the Court ruled that the plaintiffs, despite their failure to establish constitutional "intent," had presented sufficient evidence for the District Court, on remand, to make a finding of racial discrimination under Title VIII."

The decision below also conflicts with the recent opinion of the Third Circuit Court of Appeals in *Resident Advisory Board* v. *Rizzo,* —— F.2d —— (3rd Cir. Aug. 31, 1977). In that case, the Court concluded that "a Title VIII claim must rest, in the first instance, upon a showing that the challenged action by defendant had a racially discriminatory effect." Slip Op. at 39. In *Rizzo,* as in this case, the defendant city officials took steps to block the construction of public housing for low income persons in a white neighborhood of Philadelphia. Because of the high concentration of minorities in public housing and on the waiting list, taken against the background of racial segregation in the City, the District Judge held that block-

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proof of discriminatory effect will always establish a violation of Title VIII. Rather it indicated that four factors must be examined: (1) the strength of plaintiffs' showing of discriminatory effect; (2) the presence of some evidence indicating discriminatory intent; (3) the interest of the defendant in the action complained of; and (4) the nature of the relief sought by the plaintiffs. Plaintiffs submit that the Skilken facts amply satisfy this test.

[19] In reaching its decision, the Seventh Circuit relied in part, on this Court's decisions under an analogous civil rights statute, Title VII of the Civil Rights Act of 1964. The Court rejected the defendant municipality's contention that Title VII was distinguishable from Title VIII and held that under both civil rights laws, plaintiffs may prove discriminatory impact, without regard to discriminatory intent, to establish a violation. *Id.* at 8.

ing construction of the housing had a disproportionate impact on minority persons, thus violating Title VIII. The Court of Appeals affirmed the ruling that "unrebutted proof of discriminatory effect alone" is sufficient to show a violation of Title VIII, "even without direct evidence of discriminatory intent." *Id.* at 35.

These four cases, *Arlington Heights, Black Jack, Rizzo,* and *Skilken,* all have "a common nucleus of operative fact". *United Mine Workers* v. *Gibbs,* 383 U.S. 715, 725 (1966). In each instance, a housing sponsor sought to build dwellings for lower income minorities in white neighborhoods. In each case, blacks and other minorities were disproportionately overrepresented in the class of persons eligible for the housing.[20] In each situation, local officials prevented the construction of housing through various devices (*e.g.* refusal to rezone land, adoption of a new zoning ordinance, and refusal to approve a platting). In each municipality, the action of the governmental bodies perpetuated a high degree of racial residential segregation existing in the city or metropolitan area in which the housing was to be located.

This "common nucleus of operative fact" resulted in two fundamentally contrasting approaches to Title VIII by the courts reviewing these cases. In three of the Circuits (the Eighth, Seventh and Third), the courts of appeals looked to the racial context and ultimate effects of the municipal action. Where these effects significantly curtailed minority housing opportunities, the Courts, in *Arlington Heights, Black Jack,* and *Rizzo* placed a heavy burden upon the local governments to produce a substantial or compelling governmental interest to justify their actions. The Sixth Circuit, on the other hand, found the racial effect or impact of the City's action irrelevant and only required rationality in the justifications offered by the City for its conduct. The conflict among the circuits created by these divergent approaches cannot be reconciled and should be resolved by this Court.

[20] Indeed, in *Skilken,* fully 70 percent of the families who would live in the proposed housing are racial minorities. Only 14 percent of Toledo's total population are minorities.

B. Conflict with Applicable Decisions of this Court

The petitioners further contend that the opinion of the Court of Appeals conflicts with applicable decisions of this Court. First, we maintain that the decision below conflicts with recent decisions of this Court under a closely analogous civil rights law (Title VII of the Civil Rights Act of 1964), which hold that proof of a racially discriminatory effect is sufficient to establish a violation of federal civil rights statutes. Second, we argue that, if the Sixth Circuit impliedly held that the plaintiffs failed to prove "intent" under Title VIII, then the decision below conflicts with this Court's decision in *Arlington Heights.* Third, the Court of Appeals' ruling that the District Court had no power to order affirmative relief conflicts with this Court's decision in *Gautreaux.*

When this Court vacated the first judgment of the Court of Appeals and remanded the case for further consideration in light of *Arlington Heights* and *Gautreaux,* its mandate required the Court of Appeals to decide expressly at least the following questions: (1) whether plaintiffs' burden of proof under Title VIII is to prove only that the effect of the challenged con-

duct is racially discriminatory, or to prove a discriminatory "intent" or "purpose", before liability attaches; (2) if "intent" must be shown, whether the plaintiffs satisfied the evidentiary standard for "intent" outlined in *Arlington Heights;* and (3) if liability were found, whether, under the principles of *Gautreaux,* the District Court was authorized to order the defendants to develop a city-wide remedial plan to eliminate discriminatory barriers.

The Court of Appeals did not expressly address any of these questions. Apparently relying on this Court's holding in *Arlington Heights,* the Court below summarily reaffirmed its earlier ruling that the plaintiffs had not proved the requisite "intent" to show a violation of the Constitution. It ignored the plaintiffs' repeated requests to address their statutory claims based on Title VIII and other federal civil rights statutes. At best, the Court of Appeals implicitly assumed that plaintiffs' burden of proof under Title VIII (the plaintiffs' principal claim) was identical to that under the Constitution. At best also, the Court of Appeals presumably ruled that because plaintiffs were challenging municipal exercises of land use authority, affirmative relief was somehow precluded under this Court's decision in *Gautreaux,* even if a violation were established.

1. Conflict with this Court's Recent Decisions under Title VII

The opinion of the Court below conflicts with recent decisions of this Court interpreting a civil rights statute (Title VII of the Civil Rights Act of 1964) virtually identical in purpose and function to Title VIII. In these cases, this Court has held that proof of a discriminatory intent is not needed to establish liability based upon the congressional enactment. In *Dothard* v. *Rawlinson,* 97 S. Ct. 2720 (1977), this Court held that racially neutral employment practices that disproportionately and adversely affect a protected class of persons violate Title VII of the Civil Rights Act of 1964. In *Rawlinson,* a female plaintiff challenged the height and weight requirements imposed by the State of Alabama for correctional officers. This Court ruled that Title VII does not require proof of a discriminatory intent or purpose, but merely that "these facially neutral qualification standards work in fact disproportionately to exclude women from eligibility for employment. . . ." *Id.* at 2726.

That holding reflected this Court's earlier decisions that effect, not purpose or intent, is all that is required under that statute. As the Court emphasized in another recent Title VII case: "[T]he Court has repeatedly held that a prima facie Title VII violation may be established by policies or practices that are neutral on their face and in intent but that nonetheless discriminate in effect against a particular group." *International Brotherhood of Teamsters* v. *United States,* 97 S. Ct. 1843, 1961 (1977). Similarly, in *Griggs* v. *Duke Power Co.,* 401 U.S. 424, 430 (1971), this Court observed:

> Under the Act [Title VII], practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to "freeze" the status quo of prior discriminatory employment practices.

The *Skilken* Court of Appeals, in summarily ruling that discriminatory motive, not effect, is plaintiffs' burden under Title VIII, ignored this Court's deci-

sions under Title VII, a civil rights statute that is identical in purpose and function to Title VIII.[21]

2. Conflict with this Court's Decision in Arlington Heights

The Court of Appeals' implicit holding that plaintiffs had failed to prove racially discriminatory intent conflicts with this Court's ruling in *Arlington Heights.* In that case, this Court dealt at some length with the factors which should be examined to determine if particular municipal action was motivated by a discriminatory intent. In *Arlington Heights,* this Court identified, "without purporting to be exhaustive," *Id.* at 268, two important sources of the necessary proof: (1) statistical data showing a disproportionate racial impact, which is "an important starting point," *id.* at 266; and (2) substantive or procedural departures from the regular decision-making process. The opinion of the Court of Appeals does not reflect any examination of the evidentiary record to determine the application of the *Arlington Heights* standards of proof to this case. If the Court below had scrutinized the evidence, it surely would have found the requisite intent as defined in *Arlington Heights.*

In determining whether intent has been proved, this Court, in *Arlington Heights,* directed triers of fact to examine statistical data, "an important starting point," for evidence of a disproportionate impact on racial minorities. In this case, fully 70 percent of the people who would have lived in the Skilken homes were racial

[21] The Seventh Circuit, on remand from this Court's decision in *Arlington Heights*, specifically rejected the contention that proof of discriminatory intent, while unnecessary under Title VII, was required under Title VIII. Slip Op. at 8.

minorities. The Court of Appeals disregarded that teaching of *Arlington Heights.*

In addition, this Court in *Arlington Heights* noted the significance of procedural and substantive deviations from the normal mode of operations. *Id.* at 267. In this respect, too, the Court below ignored the importance which this Court placed on such departures for purposes of proving intent. The record in this case is replete with evidence of deviations from the regular course of evaluating requests for platting and rezoning. The record indicates that, when the Plan Commission staff recommends approval of a residential zoning change, the Commission has invariably followed its recommendation just as it "overwhelmingly" follows its professional staff's recommendations for platting approval. *Supra* at 16. Yet, with regard to the Skilken sites, the Commission, in unprecedented fashion, overrode the recommendations of its staff on four separate decisions, the three platting requests and the zoning change for the Heatherdowns site.

The reasons given for the Plan Commission's decision on the *Skilken* sites were also unprecedented. In rejecting the staff's recommendation on the Stateline site, for example, the Commission declared that the application "was not considered in the best interests of the community." App. 687. Yet a staff member testified that, in his 12 years of experience with the Commission, he knew of no instance in which a plat had been disapproved for such a reason. App. 224.

By the same token, the record demonstrated that the Plan Commission, before the rescission of platting for the Holland-Sylvania site, had never rescinded platting approval once it had been given. App. 652. A Plan

Commission member, when questioned about the rescission of Skilken's plat, admitted that the conclusion was "inescapable" that the platting would not have been rescinded had the Commission not learned that the site was designated for public housing. Defendants' Exhibit AY, Deposition of Stratman Cooke, at page 63.

Furthermore, when Skilken went before the City Council, in an attempt to mollify opposition to the rezoning of the Heatherdowns site, and tried to change his request from R-2 (6,000 square feet) to R-1 (9,000 square feet), the City Council refused, contrary to its normal practice, even to refer its amended request back to the Plan Commission. It simply rejected Skilken's original request. App. 618-645.

In *Arlington Heights,* this Court emphasized that the village's zoning decision simply implemented its previously established neutral policy of allocating multi-family housing to buffer zones between single family and non-residential uses. *Id.* at 270. In *Skilken,* no pre-established policy justified the City's actions. Indeed, quite the reverse was the case. Uncontroverted testimony showed that the area around the Heatherdowns site was in a "holding zone" and would ultimately be rezoned for higher density uses. In fact, many properties in the area, including the one immediately adjacent to the Skilken site, had already been rezoned R-3 (multi-family). The Skilken proposal, of course, was for single-family, detached housing.

Finally, the evidence shows that race was an admitted factor in the defendants' rejection of the Skilken proposal for the Heatherdowns site. The current Chairman of the Plan Commission, then a member, said that he was opposed to the Skilken housing in the Heather-

downs area because of neighborhood hostility. He conceded that a part of that hostility was racial. App. 494.

The District Court's analysis of the question of intent in Skilken was identical to the approach later taken by this Court in *Arlington Heights.* It first looked to statistical and historical evidence of residential segregation and then examined corroborating evidence of procedural and substantive irregularities, before drawing the inference of impermissible racial purpose. The Court of Appeals' initial decision rejected the probative value of the evidence relied upon by the District Court and thus is inconsistent with *Arlington Heights.* The Sixth Circuit's second decision, perfunctorily reaffirming its first, not only ignored *Arlington Heights,* but also the instructions of this Court on remand.

3. Conflict with this Court's Decision in Gautreaux.

The opinion of the Sixth Circuit on remand also conflicts with this Court's decision in *Hills* v. *Gautreaux, supra.* The *Gautreaux* decision stands for the principle that, once violations of statutory and constitutional rights to equal opportunity in housing have been proved against governmental defendants, broad equitable relief may be ordered, at least against those governmental defendants. The affirmative relief order granted against HUD in *Gautreaux* was far more extensive than the order of the District Court in *Skilken.*[22] Yet the Court of Appeals appears to have found

[22] In approving that order, this Court took care to note its consistency with established federal housing policies, including the affirmative duties imposed by Section 808(d)(5) of Title VIII, 42

in *Gautreaux* confirmation for its view that municipal land use practices, even if racially discriminatory, are beyond the equitable power of the Federal courts. In disapproving the District Court's use of a remedial order in this case, the Court of Appeals ignored the contrary decisions of this Court. Its reaffirmation of that disapproval directly conflicts with this Court's holding in *Hills* v. *Gautreaux, supra.*

U.S.C. 3608(d)(5). The same consistency with federal housing policy may certainly be found in the order of the District Court in Skilken. The language of the District Court's order requiring the elimination of discriminatory barriers in housing is virtually identical to existing HUD guidelines construing the obligations Title VIII places upon communities engaging in urban renewal demolition and relocation activities. HUD, Workable Program for Community Improvement, Application Processing Procedures, Handbook II, HUD Handbook 1400.2 at 35 (1971). Since 1968, Toledo has received over $50 million for such activities.

CONCLUSION

Because the judgment of the Court of Appeals directly conflicts with the decisions of at least three other courts of appeals, because it conflicts with the prior decisions of this Court, and because it provides this Court with the opportunity to determine the standard of liability applicable in Title VIII housing discrimination cases, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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September 19, 1977

APPENDIX

OPINIONS BELOW

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

No. C 74-202

JOSEPH SKILLKEN AND COMPANY, ET AL., *Plaintiffs,*

VS

CITY OF TOLEDO, ET AL., *Defendants.*

Memorandum

YOUNG, J:

Filed August 28, 1977

I. INTRODUCTION

This suit is instituted pursuant to several enactments within Title 42 of the United States Code. The specific sections are 1401, *et seq.*, 1441, *et seq.*, 1981, 1982, 1983, 2000d, and 3601, *et seq.* The action is also based upon the Thirteenth and Fourteenth Amendments to the United States Constitution. The jurisdiction of this Court is founded upon 28 U.S.C. § 1331 and 1343; 42 U.S.C. § 3612 and 3617. The plaintiffs are: Joseph Skillken Company (hereinafter Skillken) a corporation engaged in the development and construction of residential dwelling units; Toledo Metropolitan Housing Authority (hereinafter TMHA); and low income minority persons on behalf of themselves and all other low-income minority residents who seek the opportunity to live in decent, safe, and sanitary housing in the City of Toledo, outside areas of

minority concentration.[1] There are numerous defendants in this lawsuit and they appear as follows: The City of Toledo, (hereinafter City), a body corporate and politic, established and organized under the laws of the State of Ohio; Mayor Kessler, duly elected Mayor of the City of Toledo and as such the Chief Executive Officer of the City and a member of the Council of the City; Defendants Cook, Copeland, Daoust, Douglas, Galvin, Nies, Pietrykowski and Reddish, the duly elected Council members of the City of Toledo; Defendant Toledo City Plan Commission (hereinafter Commission), a commission established and organized under the laws of the State of Ohio, § 3735.27 *et seq.* Ohio Rev. Code, and the City of Toledo. The Commission's duties include the responsibility to review requests for rezoning and platting and to ensure their compliance with the Toledo zoning ordinances and subdivision regulations. Defendants Burke, Cook, Martin, Schimmel and Stoepler, are members of the Commission appointed pursuant to the laws of the State of Ohio and the City of Toledo.

II. Background

On August 12, 1968 the City and TMHA entered into a Cooperation Agreement which provides in paragraph nine:

> So long as any contract between the Local Authority and HUD for loans, (including preliminary loans) or both in connection with any Project remains in force

[1] An initial determination was made at a pretrial conference conditionally certifying the action as a class action with the class being tentatively determined as including all low income minority persons residing in the Toledo Metropolitan area who, by virtue of their race and poverty, are unable to secure decent, safe and sanitary housing in the City of Toledo, at rents or prices which they can afford without assistance from the Toledo Metropolitan Housing Authority (T.M.H.A.), and who are eligible for the Turnkey III Housing program.

> and effect, or so long as any bonds issued in connection with any Project or any monies due to HUD in connection with any Project remain unpaid, this Agreement shall not be abrogated, changed, or modified without the consent of HUD. The privileges and obligations of the Municipality hereunder shall remain in full force and effect with respect to each project so long as the beneficial title to such Project is held by the Local Authority or by any public body or governmental agency, including HUD, authorized by law to engage in the development or administration of low-rent housing projects. If at any time the beneficial title to, or possession of, any Project is held by such other public body or governmental agency, including HUD, the provisions hereof shall inure to the benefit of any may be enforced by, such body or governmental agency, including HUD.

Furthermore, the agreement contains no provision which can be construed to give the City power to approve or disapprove sites selected for low-rent housing projects by TMHA. To meet its obligations under the Cooperation Agreement, TMHA sought and received a reservation of funds from HUD for the construction of [illegible]) single family housing units under the Turnkey III Program.[2] Accordingly, TMHA advertised for proposals on the 150 units and Skillken responded to the advertisement by submitting a proposal to TMHA for the construction of 140 units of single family housing. Skillken's proposal was accepted by TMHA and a letter designating Skillken as the Turnkey developer was issued by Carl Barrett, Director of TMHA. Thereafter discussions between Skillken, TMHA and the Commission's staff resulted in choosing three sites upon which to build the proposed public housing units. Skillken then entered into option contracts for the

[2] See plaintiff's exhibit 40.

acquisition of real property to build: 50 units of public housing on the Heatherdowns Boulevard site (hereinafter Heatherdowns); 46 units of public housing on the Holland-Sylvania Road site (hereinafter Holland-Sylvania); and 34 units of public housing on the Stateline Road-Lewis Avenue site (hereinafter Stateline). In December 1973, Skillken sought approval from the Commission for the preliminary platting of the three proposed sites.[3] Simultaneously, Skillken petitioned the Commission for a rezoning of the Heatherdowns site to permit construction of single-family low-income housing on lots of smaller dimension than the existing zoning provides. This was not required for the Holland-Sylvania and the Stateline sites since the existing zoning accommodated Skillken's proposals. The Commission's staff recommended to the Commission that it approve Skillken's requests with regards to the rezoning of the Heatherdowns site and the preliminary platting for all three sites. On January 24, 1974 the Commission approved the plat for the Holland-Sylvania site. Subsequently it was revealed that Skillken's development was intended for public housing.[4] This led

[3] Technically, the laws make no provisions for preliminary platting approved by the Commission. However, the development of a legal plat is a very complicated and expensive business. A practice has been established by the Commission under which a developer could secure approval for a preliminary plat before going to the expense of preparing a complete plat. Whatever conditions the commission required in order to approve the preliminary plat could then be met in the final plat, and the approval of that plat would be merely a formal matter.

[4] The testimony of Mr. Suchan, Deputy Director of the Toledo Lucas County Plan Commission, and Mr. Willard Jacquot, Principal Planner of the Toledo Lucas County Plan Commission did not indicate that there was any subterfuge in not revealing that the proposed sites were for public housing. Rather the Commission's staff believed that their responsibility was to ensure that the proposals would meet the technical requirements for platting and whether the housing was public or private would not play a significant role in making that determination.

to a series of events which culminated in the commencement of this lawsuit. On March 7, 1974 the Commission rejected Skillken's petitions for the platting of the Stateline and Heatherdowns sites and also for the rezoning of the Heatherdowns site. After reviewing the Commission's action on rezoning the Heatherdowns site, the Toledo City Council preliminarily denied Skillken's request for rezoning on March 19, 1974. On March 21, 1974 the Commission rescinded its earlier approval of the preliminary platting for the Holland-Sylvania site. On March 26, 1974, City Council finally and formally rejected Skillken's request for rezoning of the Heatherdowns site by passage of Resolution 1-74.

The plaintiff's filed this action on May 28, 1974. At the request of the plaintiffs and because of its importance, not only to the parties involved but also to the community, the case was expedited for an early hearing which the Court scheduled for July 15, 1974. The defendants subsequently requested a trial by jury which the plaintffs opposed. The Court without ruling upon defendant's right to a trial by jury, bifurcated the trial so that the issue of injunctive relief would be heard to the Court without a jury pursuant to *Curtis* v. *Loether*, 94 S. Ct. Rptr. 1005 (1974).[5] After ruling upon various preliminary matters,[6] the hearing upon plaintiffs' request for declaratory and permanent injunctive relief commenced on July 15, 1974, and continued, with interruptions on July 18, into the morning of July 19, 1974.

[5] *See* Pretrial Order filed July 3, 1974.

[6] Among the Court's rulings were denials of motions to intervene filed by both plaintiff-applicants, see Memorandum and Order filed July 1 ,1974, and defendant-applicants. See Memorandum and Order filed July 8, 1974.

III. Housing

The City of Toledo, according to the 1970 census, had a population of 383,818 persons; 329,068, or approximately 86%, were white; 52,915, or approximately 14% were black; and 1,835, or less than 1% were of other minority groups. It quickly became apparent from the testimony of various witnesses and the statistical evidence submitted that the City of Toledo is a racially segregated city with minority groups [7] heavily concentrated in limited sections of the City known as the "Southwest Corridor," or the "Black Corridor".[8] The forces which brought about this segregated housing pattern were many. Among them were a policy of channeling or steering white prospective buyers away from black neighborhoods and black prospective buyers away from white neighborhoods by real estate agents. Blacks also encountered far greater difficulty in obtaining financing for homes than their white counterparts. Unfortunately, the record very clearly shows that these forces are still at work with the effect of creating *de facto* segregation not only in housing but also in the racial composition of the public schools in the City.[9]

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[7] In referring to minority groups the Court intends to include in this designation such races, creeds and national origins as are normally so indicated including specifically Black Americans, American Indians, Orientals and individuals with Spanish surnames.

[8] See plaintiffs' exhibit 165, a 1970 Toledo Urban Area Census Tract Map, illustrating the racial composition of the City of Toledo; and plaintiffs' exhibit 170, a "Black" Map illustrating the percent of blacks living in any one block of the City of Toledo.

[9] The City of Toledo school system is classified as a "neighborhood school concept." As a result of the segregated housing pattern in the City there is great disparity in the racial composition of both elementary schools, compare Longfellow: Minorities-10, Whites-1,106 to Lincoln: Minorities-893, Whites-0, and high schools, compare Bowsher: Minorities-50, Whites-1,777 to Scott: Minorities-2,183, Whites-60. See plaintiff's exhibits 67-69.

Past public housing projects were, until very recently, consistently placed in areas adjacent to already highly concentrated minority housing further adding to the segregated pattern. TMHA and the Commission's Staff, in an attempt to change that policy and scatter public housing projects throughout the City, cooperated with Skillken in selecting three sites which they believed would accomplish this purpose. The Heatherdowns site,[10] the Stateline site [11] and the Holland-Sylvania [12] site are all located in areas where there is 0-2% minority population. Furthermore the sites would be scattered in distinct sections of the City: Heatherdowns in the southwest corner, Holland-Sylvania in the west and Stateline in the north. The testimony very clearly showed that given the presently existing and quite limited availability of land in the City, the sites could not be scattered more. The records of the hearings before the Commission and the Council are a sad display of bigotry, intolerance, and selfishness at its worst. With a great, but totally hypocritical, show of piety, public officials and neighboring property owners pretended that to develop groups of dwellings would only create new ghettoes and that acceptable minority housing can only be obtained by building or buying individual houses throughout the city, or better still, by going out into the suburbs or rural areas beyond the city. The evidence in this case leaves no doubt that the actions and attitudes which have created segregation in Toledo are so strong and so persistent that only very positive court

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[10] The high school which serves that area is Maumee High and the racial composition as of 1973 was: Minorities-32, Whites-1,333. Plaintiffs' Exhibit 71.

[11] The high school which serves that area is Whitmer High and the racial composition as of 1973 was: Minorities-20; Whites-2,935. Plaintiff's Exhibit 70.

[12] The high school which serves that area is Rogers High and the racial composition as of 1973 was Minorities-332, Whites-1,986. Plaintiffs' Exhibit 69.

action can change the present housing patterns. The housing that was proposed for these sites would be under HUD's Turnkey III Program, which provides that the public housing be constructed for single-family dwelling units with potential ownership by the resident. The prospective residents would be selected by TMHA from its eligibility lists. Presently 70% of the families living in TMHA family projects are minorities.[13] Furthermore, approximately 70% of the people on the waiting list for Turnkey III housing are minorities and approximately 50% of the total minority population in the City are eligible for public housing.[14] The inescapable conclusion that must be drawn from these statistics is that decisions regarding public housing disproportionately effect minority groups since they comprise the vast majority of people who qualify for such housing.

IV. Initial Determination of Discrimination

The primary emphasis of the plaintiff's lawsuit is not grounded upon a claim of a denial of a fundamental right to decent housing, *Lindsey* v. *Normet*, 405 U.S. 56 (1972) or upon a claim of discriminatory treatment engendered by suspect wealth classification, *San Antonio* v. *Rodriguez*, 411 U.S. 1 (1973). Instead, the plaintiffs contend that the defendants' decisions to reject the proposed housing sites were racially motivated. This is a serious charge, and one that this Court has grappled with in many forms. See *Afro-American Patrolmen's League* v. *Duck*, 366 F. Supp. 1095 (N.D. Ohio 1973). And although it has been a score of years since the federal judiciary cast aside any doubts that racial discrimination would not be tolerated, *Brown* v. *Board of Education*, 347 U.S. 483 (1954), the subtleties that have been refined and developed to perpetuate discriminatory practices require that the judiciary continue

[13] Plaintiffs' Exhibit 60.

[14] *Id.* and plaintiffs' Exhibit 61.

to scrutinize all decisions of public or private organizations involving the likelihood of discrimination and intervene positively when necessary to create and promote equality. There can no longer be any question that under our Constitution distinctions in treatment based upon race are inherently suspect. *Brown* v. *Board of Education, supra; McLaughlin* v. *Florida*, 379 U.S. 184 (1964); *Loving* v. *Virginia*, 388 U.S. 1 (1967).

Furthermore, Congress has continued to expand the protection of individual rights by the passage of the Fair Housing Act. As stated at the outset of this legislation, it was enacted to ensure a "policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States" 42 U.S.C. § 3601. Similar to the 1866 Civil Rights Act, this legislation passed as Title VIII of the Civil Rights Act of 1968, is a congressional exercise of power under the Thirteenth Amendment to eliminate the badges and incidents of slavery. The United States Supreme Court recognized this by stating, when reviewing an action under 42 U.S.C. § 1982, that:

> [W]hen racial discrimination herds men into ghettos and makes their ability to buy property turn on the color of their skin, then it too is a relic of slavery. *Jones* v. *Mayer Co.*, 392 U.S. 409, 442-43 (1968).

Therefore Title VIII and Civil Rights Act of 1866 together comprehensively spell out the right of an individual to rent or purchase housing without suffering discrimination and to obtain federal enforcement of that fundamental guarantee. *Jones, supra.* As stated by the United States Court of Appeals for the Eighth Circuit in *Williams* v. *The Matthews Co.*, No. 73-1765 (8th Cir. filed June 20, 1974):

> Recent cases make clear that the statutes prohibit all forms of discrimination, sophisticated as well as

simple-minded, and thus disparity of treatment between whites and blacks, burdensome application procedures, and tactics of delay, hinderance, and special treatment must receive short shrift from the courts. *See United States* v. *Pelzer Realty Company, Inc.*, 484 F.2d 438 (5th Cir. 1973); *United States* v. *Youritan Construction Company*, No. C-71 1163 ACW (N.D. Cal., filed Feb. 8, 1973); *Hall* v. *Freitas*, 343 F. Supp. 1099 (N.D. Cal. 1972); *Newbern* v. *Lake Lorelei, Inc.*, 308 F. Supp. 407 (S.D. Ohio 1968); *Brown* v. *Lo Duca*, 307 F. Supp. 102 (E.D. Wisc. 1969).

Race is an impermissible factor in real estate transactions under both 42 U.S.C. § 1982 and 42 U.S.C. § 3604 and "cannot be brushed aside because it was neither the sole reason for discrimination nor the total factor of discrimination." *Smith* v. *Sol D. Adler Realty*, 436 F.2d 344, 349-350 (7th Cir. 1970). The courts will look beyond the form of a transaction to its substance and proscribe practices which actually or predictively result in racial discrimination irrespective of defendant's motivation. *See United States* v. *Grooms*, 348 F. Supp. 1130, 1133-1134 (M.D. Fla. 1972); *United States* v. *Real Estate Development Corporation*, 347 F. Supp. 776, 782 (N.D. Miss. 1972); *United States* v. *Reddock*, No. 6541-71-P (S.D. Ala. filed Jan. 1, 1972), aff'd, 467 F.2d 897 (5th Cir. 1972).

On this basis the Court finds that the concept of the "prima facie case" under the Civil Rights Act of 1866 is further augmented by the Fair Housing legislation and applies to discrimination in housing as much as to discrimination in other areas of life.

In reviewing the record in this context the Court finds that in the past recommendations by the Commission's Staff with regards to platting were normally approved.[15]

[15] The Commission's Staff recommended approval of the platting of all three sites and also rezoning of the Heatherdowns site.

Mr. Cline, a member of the Commission since 1937, Chairman since 1941 and at the time the three Site proposals were rejected, could not recall any specific incidents when the Commission's Staff recommendations were not approved but seemed to remember it occurring once about 10 to 15 years ago. It is notable that although he had had ample opportunity before the trial to research the records of the Commission he could not offer dates or occasions but only vague recollections. The Court is forced to conclude that there really never were any previous instances of the Commission doing what it did here. The record is also replete with rezoning changes in the Heatherdowns area from R-A to various other residential and commercial uses. The present zoning for this area was frequently referred to as in a "holding status" with rezoning contemplated in the near future. Furthermore when specifically asked if the rescission of the Holland-Sylvania platting would have occurred if the development were not designated for public housing, Mr. Cooke, present Chairman and then member of the Commission, answered: "Probably not. I think that's inescapable. Probably not."[16] When the fact that the majority of people who are presently living in public housing are members of minority races is coupled with the fact that the majority of persons who are eligible and waiting for public housing are also members of minority races, the conclusion that any discussion of public housing has racial overtones is unavoidable. In this light and based upon the overwhelming evidence introduced, the Court finds, notwithstanding the attempts by the City to defend its actions, that the plaintiffs have clearly and convincingly met their burden of establishing a case of racial discrimination on the part of the City. *Burton* v. *Wilmington Park Authority*, 365 U.S. 715 (1961); *United Farmworkers* v. *City of Delray Beach*, 493 F.2d 799 (5th Cir. 1974);

[16] Defendants Exhibit AY, Deposition of Stratman Cooke at page 63.

United States v. *Pelzer Realty Company*, 484 F.2d 438 (5th Cir. 1973); *Hawkins* v. *Town of Shaw*, 461 F.2d 1171 (5th Cir. 1972); *Kennedy Park Homes Ass'n* v. *City of Lackawanna*, 436 F.2d 108 (2nd Cir. 1970), *cert. denied* 401 U.S. 1010 (1971); *Daily* v. *City of Lawton*, 425 F.2d 1037 (10th Cir. 1970); *Banks* v. *Perk*, 341 F.Supp. 1175 (N.D. Ohio 1972) *aff'd in part, rev'd in part* 473 F.2d 910 (6th Cir. 1973).

V. Justification for Discrimination

Once the existence of a racially discriminatory effect is proven, the burden shifts to the defendants to demonstrate that the discrimination was necessary to promote a compelling governmental interest. *In re Griffiths*, 413 U.S. 717 (1973); *McLaughlin* v. *Florida, supra; Loving* v. *Virginia, supra; Kramer* v. *Union Free School District*, 395 U.S. 621 (1969); *Shapiro* v. *Thompson*, 394 U.S. 618 (1969); *Sherbert* v. *Verner*, 374 U.S. 398 (1963); *Skinner* v. *Oklahoma*, 316 U.S. 535 (1942).

The City suggests a number of reasons to justify its actions and to meet the "compeling interest" test.

A. TMHA

The City first argues that the past housing projects that TMHA has supervised or been involved with have proven to be failures. Further, that TMHA has not worked closely with the City or Commission in developing public housing. The Court can take judicial notice of the fact that TMHA-involved projects have encountered difficulties. See *Markowitz* v. *TMHA*, Civil No. 70-268 (N.D. Ohio Memorandum filed April 25, 1973). However, the City's mere assertion cannot justify its actions. The City as an equal partner with TMHA is also charged with the responsibility of deveoping an integrated housing pattern for the community. The Mayor has a direct input with TMHA for he selects the persons who serve as members of TMHA's Board of

Directors. No evidence was submitted to show that the City attempted to prod TMHA to become a more effective organization or that TMHA spurned the City's efforts in that direction. Rather, it can only be concluded that if there were a demise of TMHA as a responsible entity, the City idly watched it occur. The evidence submitted does not support the City's contention that TMHA has not worked closely with it. The testimony of the Commission's Staff indicated that there was a close and cooperative working relationship between staffs of both organizations. Further, the failure of TMHA to appear at the Commission's and Councils' hearings on the proposals for these sites may be attributed to the fact that neither the Commission nor the Council ever requested members of TMHA to appear. The defendants cannot merely shift the blame to another governmental organization because of that organization's lack of cooperation and efficiency when it is evident that the defendants failed to show any initiative either. There is some indication that the members and employees of TMHA justified their failure to involve themselves in the Commission and City proceedings in this matter because under its reading of the housing law, all reponsibility in this area is imposed upon Skillken. This example of bureaucratic ducking is typical of TMHA's pusillanimous approach to its responsibilities.

B. *Neighborhoods*

The Heatherdowns site is presently zoned R-A (20,000 sq. ft. lots). In order that the proposed public housing be constructed at this site a rezoning to R-1 (9,000 sq. ft. lots) or R-2 (6,000 sq. ft. lots) was required. City Council and the Commission attempted to justify rejecting the proposals on the grounds it was not beneficial for the neighborhood. It appears that specific reference is made to Ragan Woods, a housing development across what will eventually be a four lane divided highway from the proposed site.

Ragan Woods is comprised of homes valued in excess of $70,000 and presently zoned R-A. However, the record also shows that this area has been frequently rezoned from the initial R-A to other types of residential and commercial uses.[17] The City's explanation for denial of the rezoning is consequently no real explanation at all when viewed in these terms. At most, it is a excuse and a very poor one. It seems to this Court to be completely illogical to contend that rezoning to other residential and commercial uses can be beneficial to the neighborhood yet the plaintiff's requested rezoning would be harmful, unless it be *conceded that having poor or* minority persons in the neighborhood is harmful, and may legally be forbidden. As stated in *Banks* v. *Perk, supra* at 1180 citing from *Dailey* v. *City of Lawton,* 425 F.2d 1037 (10th Cir. 1970):

> "[I]f proof of a civil right violation depends on an open statement by an official of intent to discriminate, the Fourteenth Amendment offers little solace to those seeking its protection." 425 F.2d at 1039. Therefore in the absence of any supervening necessity or compelling governmental interest, any municipal action or inaction, over, subtle or concealed, which perpetuates or reasonably could perpetuate discrimination especially in public housing, cannot be tolerated.

A similar "neighborhood" defense is made with regards to the denial of the Stateline site and the recission of the Holland-Sylvania site. Similarly the Court disposes of those defenses for the reasons enunciated above.

C. *Technical Requirements*

The defendants argue that the Stateline site proposal was properly rejected because there was evidence of "fill" and that the land is subject to flooding. Mr. Cline supported these contentions by referring to photographs shown to him by Mrs. Burke, a woman who had lived in the area for over fifty years. These photographs showed that there was water on the land at one time. However, according to the testimony of Mr. Huber, a registered professional civil engineer, the land was above flood level. Soil boring tests conducted on the site[18] demonstrated that what little old fill existed was shallow, and the building foundations would rest on undisturbed original soil. From all the evidence there appears to be no engineering reason why the proposed housing development cannot be constructed. No competent fact finder could properly have given any credence to the exaggerated and distorted memories of so unabashedly interested a witness as Mrs. Burke against the scientific evidence which contradicted it. To accept prejudiced lay testimony as showing an absence of compliance with technical requirements is so patently a subterfuge as to be totally unacceptable.

[17] Plaintiffs Exhibits 85-103

D. *Clustered Housing*

The City also argued that clustered housing may be fine theoretically but is lacking in a practical sense. Since the three proposed developments consist of small groupings of houses, the City submits it properly rejected them. Such an argument completely overlooks that clustered housing developments are not only rampant throughout the Toledo Community but throughout the United States. To contend that these proposals were properly rejected because they are clustered housing when over the years the Commission and the City have dutifully approved platting and rezoning for other clustered housing developments in every section of the city, is nonsensical. For what distinguishes the Skillken proposed clustered housing from the already existing clustered housing developments other than the potential residents? This argument

[18] Plaintiffs Exhibits 15-18.

is particularly offensive when it is applied to the Heatherdowns site. Is Ragan Woods any less clustered because the lots and the prices are twice as big as Skillken proposes? The appalling cluster of the adjacent Southwyck development, shown on the exhibits in evidence, totally demolishes this argument.

E. *Justification Lacking*

In the instant case, as in the *Lackawanna* case, the plaintiffs seek "to exercise their constitutional right of 'freedom from discrimination by the States in the enjoyment of property rights.' *Shelley* v. *Kraemer*, 334 U.S. 1, 20 (1948). The effect of the City's action is inescapably adverse to the enjoyment of this right. In such circumstances the City must show a compelling governmental interest in order to overcome a finding of unconstitutionality." *Lackawanna, supra* at 114.

After a complete review of the record, the Court cannot find that the City has even come close to meeting its burden. The justifications the City tenders are devoid of the requisite "compelling" nature. When viewed in the light of past practices of the City they lack merit and are transfigured into vain, albeit, subtle, attempts to veil racially motivated decisions. The Court cannot be swayed by what the City articulates [19] when the effect of its decisions are discriminatory. The Constitution does not permit, and therefore this Court cannot permit, unjustified racial discrimination.

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[19] Mr. Raymond Palmer, Acting Director of the Department of Community Development, testified in reference to plaintiffs' exhibits 81-83, that the City in applying for financial grants from HUD indicated that 150 housing units were scheduled for construction to provide homes for displaced persons. The Skillken housing developments were included within the 150 anticipated housing units. This creates a situation whereby the City seeks funds for construction of public housing and then turns around and rejects the proposals of the developer which would implement its stated policy.

VI. Mahaley

The defendants at numerous junctures argued that the instant case is governed by the holding of *Mahaley* v. *Cuyahoga Metropolitan Housing Authority*, No. 73-1407 (6th Cir. filed July 9, 1974). This Court finds it clearly distinguishable. In *Mahaley* the Court of Appeals was asked to decide if a constitutional violation resulted when neighboring municipalities did not enter into cooperation agreement with the local housing authority and refused to consent to the construction of public housing units within their boundaries. The Court of Appeals held there was not a constitutional violation because the decision to enter into a Cooperation Agreement was within the discretion of the municipality. In the instant case, the City has previously entered into a cooperation agreement with the local housing authority (TMHA).[20] Further, this Court has found that the discriminatory housing pattern which has evolved in the City resulted from a prior pattern of discrimination and also that the City's actions fall more heavily upon minority group members than upon the population as a whole. *See Citizens Comm. for Faraday Wood* v. *Lindsay*, 362 F.Supp. 651 (S.D. N.Y. 1973). Although this Court is aware of the *Mahaley* admonitions, it does not find the *Mahaley* holding to be controlling upon the case before.

VII. Conclusion

The Court is cognizant of the complex emotional problems that a case such as this presents. Appropriately, it reiterates the oft quoted words of Justice Day, writing for a unanimous Court, in *Buchanan* v. *Worley*, 245 U.S. 60, 80-81 (1917):

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[20] This Court has previously held when asked to review the Cooperation Agreement that it is binding upon the City. *See Davis* v. *City of Toledo*, Civil No. 70-157 (N.D. Ohio filed June 8, 1970).

> That there exists a serious and difficult problem arising from a feeling of race hostility which the law is powerless to control, and to which it must give a measure of consideration, may be freely admitted. But its solution cannot be promoted by depriving citizens of their constitutional rights and privileges.

The evidence in this case demonstrates that this Court's conditional certifying of this matter as a class action shall proceed as a class action, and the class of plaintiffs is hereby certified as including all low income minority persons residing in the Toledo Metropolitan area who, by virtue of their race and poverty, are unable to secure decent, safe and sanitary housing in the City of Toledo, at rents or prices which they can afford without assistance from the Toledo Metropolitan Housing Authority (T.M.H.A.), and who are eligible for the Turnkey III Housing Program.

The named plaintiffs are members of this class, and they have more than adequately represented the other members of the class.

As to this portion of the case, the Court finds that Resolution 1-74 passed by the Toledo City Council on March 26, 1974, and the actions taken by the Toledo City Plan Commission in disapproving the rezoning of the Heatherdowns Boulevard site, and the platting of the Holland-Sylvania Road, Stateline Road-Lewis Avenue, and Heathertowns Boulevard sites are void and unenforceable.

The Court further finds that the plaintiffs are entitled to a permanent injunction restraining the defendants, their officers, agents, and employees, and any and all other persons acting in concert or participation with them:

(1) From enforcing Resolution 1-74 passed by the Toledo City Council on March 26, 1974, and the actions of the Toledo City Plan Commission in disapproving

the rezoning and platting of the Heatherdowns Blvd., Holland-Sylvania Road, and Stateline Road-Lewis Avenue sites;

(2) From failing to take all necessary steps to approve Skillken's request for platting approval on the Heatherdowns Blvd., Holland-Sylvania Road, and Stateline Road-Lewis Avenue sites, and for rezoning the Heatherdowns Blvd. site;

(3) From engaging in any acts or practices which have the purpose or effect of denying equal housing opportunities because of race, color, religion, or national origin, or of interfering with the implementation and execution of federal housing programs, or of breaching the August 12, 1968 Cooperation Agreement; and

(4) From expending, or borrowing on any monies allocated to defendants City of Toledo or Toledo City Plan Commission by the U.S. Department of Housing and Urban Development, except for those funds directly related to hardship acquisitions and to the immediate rehabilitation and expansion of the low and moderate income housing supply in the City of Toledo until defendant have complied with (1), (2) and (3) above;

The Court further finds that the issues decided in this case involve controlling questions of law as to which there are substantial grounds for differences of opinion and an immediate appeal would advance the ultimate termination of this litigation. Therefore the Court will permit an interlocutory appeal pursuant to 28 U.S.C. § 1292(b).

This matter is continued to a date to be fixed by the Court for a determination of the issue of damages for the plaintiff Skillken, and of the question of the request of the defendants to a jury trial upon this issue.

This memorandum will serve as the Court's findings of fact and conclusions of law. Plaintiffs may prepare and submit an order reflective of these findings and conclusions in accordance with the Local Civil Rules.

/s/ Don J. Young
United States District Judge

Toledo, Ohio

In conformity with Rule 77 (d) F.R.C.P. please take notice that the following order of judgment was entered in this court on October 8, 1974.

Mark Schlachet, Clerk

(Caption Omitted in Printing)

Order

Pursuant to this Court's findings of fact and conclusions of law contained in its memorandum of August 28, 1974, the Court finds that it has jurisdiction of this action pursuant to 28 U.S.C. §§ 1331 and 1343, and 42 U.S.C. §§ 3612 and 3617 and that this action is properly maintained pursuant to 42 U.S.C. §§ 1401, *et seq.*, 1441 *et seq.*, 1981, 1982, 1983, 2000d, and 3601 *et seq. and the Thirteenth* and Fourteenth Amendments to the United States Constitution.

Therefore for Good Cause Appearing, It Is

I.

Ordered that this action be and hereby is certified to proceed as a class action pursuant to Rule 23(a), (b)(1)(A)(B), and (2) of the Fed. R. Civ. P. with the class consisting of all low income minority persons residing in the Toledo Metropolitan Area who, by virtue of their race and poverty, are unable to secure decent, safe, and sanitary housing in the City of Toledo, at rents or prices which they can afford without assistance from the Toledo Metropolitan Housing Authority (TMHA) and who are eligible for the Turnkey III Housing Program.

And It Is Further

Ordered that Sandra Hueston and Jose Maldonado are members of this class of plaintiffs and are adequate representatives of the class.

AND IT IS FURTHER

ORDERED and DECLARED that the passage of Resolution 1-74 by the Toledo City Council on March 26, 1974, in disapproving the rezoning of the Heatherdowns Boulevard site, and the actions taken by the Toledo City Plan Commission in disapproving the rezoning of the Heatherdowns Boulevard site, and the platting of the Holland-Sylvania Road, Stateline Road-Lewis Avenue, and Heatherdowns Boulevard sites, without any regard to the defendants' intentions or motivations, are and have the effect of being racially discriminatory, or perpetuating racial residential segregation, and that these actions deny plaintiffs and the members of their class equal housing opportunities and violate rights secured to plaintiffs under 42 U.S.C. §§ 1401, *et seq.*, 1441, *et seq.*, 1981, 1982, 1983, 2000d, and 3601, *et seq.*, and the Thirteenth and Fourteenth Amendments to the United States Constitution, and constitute a breach of the August 12, 1968 Corporation Agreement.

AND IT IS FURTHER

ORDERED and DECLARED that Resolution 1-74 passed by the Toledo City Council on March 26, 1974, and the actions taken by the Toledo City Plan Commission in disapproving the rezoning of the Heatherdowns Boulevard site and the platting of the Holland-Sylvania Road, Stateline Road-Lewis Avenue, and Heatherdowns Boulevard sites are void and unenforceable.

THEREFORE IT IS

II.

ORDERED that the defendants Harry Kessler, Gene Cook, William Copeland, Pamela Daoust, Andrew Douglas, June Galvin, Ray Nies, Carol Pietrykowski and Max Reddish, adopt a resolution changing the zoning of the Heatherdowns Boulevard site (as defined in plaintiff Skilken's

application for rezoning) from its present R-A zoning classification to R-1 zoning classification.

AND IT IS FURTHER

ORDERED that the defendants Richard Burke, Stratman Cooke, Robert Martin, Paul Schimmel and John W. Stoepler adopt resolutions giving approval to the preliminary plats submitted by Skilken for the Holland-Sylvania Road, Stateline Road-Lewis Avenue, and Heatherdowns Boulevard sites.

AND IT IS FURTHER

ORDERED that the defendants, their officers, agents, employees, and any and all other persons acting in concert or participation with any of them, be and they are hereby

PERMANENTLY ENJOINED:

A. From taking any action to enforce or give any effect whatever to Resolution 1-74 passed by the Toledo City Council in disapproving the rezoning of the Heatherdowns Boulevard site and the actions of the Toledo City Plan Commission in recommending the disapproval of the rezoning of the Heatherdowns Boulevard site and the actions of the Toledo City Plan Commission in disapproving the preliminary plats for the Heatherdowns Boulevard, Holland-Sylvania Road, and Stateline Road-Lewis Avenue sites;

B. From failing to take all necessary and appropriate steps to approve the rezoning of the Heatherdowns Boulevard site to R-1 (9,000 sq. ft.) and the platting of the Heatherdowns Boulevard, Holland-Sylvania Road, and Stateline Road-Lewis Avenue sites, and to approve the final plats for said sites so long as the same conform to and fulfill the descriptions, conditions and requirements of the

preliminary plats, including the modification of the Heatherdown plat from R-2 to R-1 zoning.

C. From interfering with, relaying, failing to take, all necessary and appropriate steps to ensure, facilitate, and expedite the development and construction of public housing on the Heatherdowns Boulevard, Holland-Sylvania Road, and Stateline Road-Lewis Avenue sites:

D. From engaging in any acts or practices which have the purpose or effect of denying equal housing opportunities because of race, color, religion, or national origin, or of interfering with the implementation and execution of Federal housing programs or of interfering with or breaching the August 12, 1968 Cooperation Agreement.

And It Is Further

III.

Ordered that in order to eliminate the past and continuing effects of racial residential segregation, the defendants shall, after consultation with plaintiffs, submit to this Court within ninety (90) days after the entry of this order, a comprehensive plan whereby the defendant City of Toledo and Toledo City Plan Commission, their members, officers, agents, employees, and all persons acting in concert and participation with them, shall affirmatively engage themselves in substantial efforts to eliminate discriminatory barriers in the total housing supply and make housing in a broad choice of neighborhoods freely and fully available to minority persons.

And It Is Further

Ordered that following defendants' submission to the Court of the above plan, plaintiffs may submit to the Court within twenty (20) days thereafter any objections or alternative suggestions to such plan.

And It Is Further

IV.

Ordered that this Court's memorandum of August 28, 1974 is hereby modified to read as follows:

A. The name "Cook" as it appears on page 2 of the memorandum shall read "Cooke."

B. The sentence "Regan Woods is comprised of homes valued in excess of $70,000 and presently zoned R-A" as it appears on page 11 of the memorandum shall read,

> "Ragan Woods is comprised of homes valued in excess of $70,000 and presently zoned R-B."

C. The name "Raymond Palmer" as it appears on page 14 of the memorandum shall read "Wayman Palmer."

And It Is Further

Ordered that the issue of damages for the plaintiff Skilken and the request of the defendants for a jury trial upon this issue be continued to date to be fixed by this Court,

And It Is Further

Ordered that this action involves controlling questions of law as to which there are substantial grounds for difference of opinion; that an immediate appeal would advance the ultimate termination of this litigation: and that an interlocutory appeal will be permitted pursuant to 28 U.S.C. § 1292(b).

And It Is Further

Ordered that plaintiffs shall receive their costs expended to date herein.

AND IT IS FURTHER

ORDERED that this Court shall retain jurisdiction over this matter for the entry of such further orders as may be appropriate to effectuate the provision of this order.

ALL OF WHICH IS SO ORDERED.

/s/ DON J. YOUNG
United States District Judge

Toledo, Ohio

Nos. 74-2116 & 74-2320

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 74-2116

JOSEPH SKILLKEN & Co., et al, *Plaintiffs-Appellees,*

v.

CITY OF TOLEDO, et al, RAGAN WOODS HOMEOWNERS ASSOCIATION, et al, *Intervenor-Defendants-Appellants.*

No. 74-2320

JOSEPH SKILLKEN & Co., et al, *Plaintiffs-Appellees,*

v.

CITY OF TOLEDO, et al, *Defendants-Appellants.*

APPEAL from United States District Court for the Northern District of Ohio, Western Division.

Decided and Filed December 10, 1975.

Before PHILLIPS, Chief Judge, WEICK, Circuit Judge, and MILES*, District Judge.

WEICK, Circuit Judge, delivered the opinion of the Court, in which MILES, District Judge, joined. PHILLIPS, Chief Judge, (pp. 27-28) filed a separate concurring opinion.

WEICK, Circuit Judge. These two appeals were consolidated for oral argument.

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* The Honorable Wendell A. Miles, Judge, United States District Court for the Western District of Michigan, sitting by designation.

They involve important questions of law in a low income public housing suit brought under 42 U.S.C. §§ 1401, *et seq.*, §§ 1981-1983, 2000d, *et seq.*, and §§ 3601, *et seq.*, concerning the propriety of a mandatory injunction issued by the District Judge commanding the governing body of the City of Toledo, Ohio, namely, the members of the City Council, to rezone by a spot zoning ordinance an area in the neighborhood of expensive residential property in the Ragan Woods Addition, which area had been zoned previously under Toledo's comprehensive zoning ordinance. The mandatory injunction also required the defendants to approve a preliminary plat for that area, and for two other areas of the city, all to accommodate the construction of one hundred forty-five Turnkey III low cost public housing units in said areas.

They further involve the propriety of the order of the District Court, not considered in its published opinion, requiring the City Council to submit to the Court within 90 days, a comprehensive plan for the integration of the residential neighborhoods of the City of Toledo.

The property owners in the Ragan Woods Addition filed a motion to intervene as defendants in the suit against the municipal defendants, on the ground that to change the existing comprehensive zoning ordinance to accommodate the construction of low cost housing would depreciate substantially the values of their properties. The motion to intervene, together with a proposed answer to the complaint, was promptly filed within three days after the municipal defendants had filed their answers to the complaint.

The District Judge summarily denied the motion without even a hearing, the grounds for denial being that it was untimely filed, that the property owners did not have sufficient interest, and that they were adequately represented by counsel for the municipal defendants.

Appeals were taken to this Court by the property owners who were denied intervention in case number 74-2116, and by the municipal defendants in case number 74-2320.

The municipal defendants moved for a stay of the District Court's mandatory injunction pending appeal, which stay was granted by the District Court, but only on condition that the City of Toledo execute a supersedeas bond in the amount of $880,709.[1] The City promptly posted the bond.

The plaintiffs in the case were Joseph Skillken & Company (Skillken), a Columbus, Ohio corporation, engaged in the development and construction of residential housing units, Toledo Metropolitan Housing Authority (TMHA), Jose Maldonado and Barbara Talley, a Mexican American and a Negro, on behalf of themselves and other low income minorities living in Toledo, and who allegedly are in need of housing.

The defendants were the City of Toledo, its Mayor, and the individual members of its Plan Commission and City

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[1] Revised Code of Ohio, Sec. 2505.12 exempts the state and municipalities and their officers from giving bonds. See *Sharon Realty Co.* v. *Westlake*, 114 Ohio App. 421 (1961). Similarly, Rule 62(e) of the Fed.R.Civ.P. exempts the United States or its officers or agencies. 28 U.S.C. § 2408.

In *Marrow* v. *City of Ferguson*, 114 F.Supp. 755, 756 (E.D. Mo. 1953), *aff'd* 210 F.2d 520 (8th Cir. 1954), the District Court, under Missouri statutes similar to Ohio's held that the statutes created substantive rights, not merely procedural, and dispensed with bond in an appeal.

Furthermore, the District Court had previously bifurcated the damage issues from the injunctive issues, and no damages had been awarded. The record does not disclose any question about the solvency of the City or its ability to respond in damages. It is not understandable, in any event, why such a high bond was required. The District Court even had discretion to issue the stay without any bond, in the absence of proof of likelihood of harm. *Continental Oil Co.* v. *Frontier Refining Co.*, 338 F.2d 780 (10th Cir. 1964).

Council. Skillken and TMHA were each represented by their own attorneys. Maldonado and Talley were represented by the attorneys of Advocates for Basic Legal Equality and the National Committee Against Discrimination in Housing. The municipal defendants were represented by the Director of Law of the City and his assistants.

The City had entered into a co-operation agreement with AMHA on August 12, 1968.[2] TMHA sought and received a reservation of funds from the Department of Housing and Urban Development (HUD) for the construction of 150 units of single-family low-income housing units under the Turnkey III Program. TMHA thereafter advertised for proposals on the 150 units. Skillken responded to the advertisement by submitting to TMHA a proposal for the construction of 140 units of single-family housing. The proposal was accepted and a letter designating Skillken as the Turnkey III developer was issued by the Director of TMHA. Under the Turnkey III Program the developer is responsible for securing sites and obtaining all necessary zoning and platting approvals.

Following discussions among Skillken, TMHA, and staff members of the Plan Commission, three sites were chosen upon which to construct the proposed public housing units. Skillken then entered into option contracts for the acquisition of real property to build as follows:

50 units of public housing on the Heatherdowns Boulevard site (hereinafter Heatherdowns);

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[2] The 1968 co-operation agreement superseded a previous co-operation agreement entered into in 1938, which was amended in 1940.

Under the 1938 agreement sites selected for low-rent public housing required consent of the City of Toledo. The 1938 agreement gave the City no such authority to approve sites. *Davis* v. *City of Toledo*, 54 F.R.D. 386 (N.D.Ohio, W.D. 1970).

46 units of public housing on the Holland-Sylvania site (Holland-Sylvania); and

34 units of public housing on the Stateline Road-Lewis Avenue site (Stateline).

In December, 1973 Skillken requested approval from the Plan Commission for the preliminary platting of the three proposed sites. Simultaneously Skillken petitioned the Plan Commission for a rezoning of the Heatherdowns site from an R-A residential classification of 20,000-square foot lots to an R-2 residential classification of 6,000-square foot lots, which would permit construction of fifty single-family low income housing units on lots of much smaller dimension than authorized by existing zoning. Zoning changes were not required for the Holland-Sylvania or Stateline sites, since existing zoning accommodated the proposals.

On January 24, 1974 the Plan Commission's staff conditionally recommended, and the Plan Commission accepted, the preliminary plat for the Holland-Sylvania site.[3] During this meeting consideration was given to the preliminary platting of the Stateline site, but action was deferred until February 7, 1974 when the Plan Commission met to consider the preliminary platting of the Stateline and Heatherdowns sites.

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[3] Preliminary platting is required under the Subdivision Rules and Regulations of the City of Toledo. Ohio Revised Code makes no provision for preliminary platting. Because the development of a legal plat is complicated and expensive the Plan Commission established a practice under which a developer may secure approval for a preliminary plat before going to the expense of preparation of a complete plat. Whatever conditions the Commission might require in order to approve the preliminary plat could then be met in the final plat.

Prior to this time the Plan Commission was unaware that public housing was to be constructed on the sites because the staff had neglected to advise it of that fact.

Residents from these areas attended the meeting and voiced strong disapproval of the construction of public housing units because of the potential water drainage problems that higher density dwelling units would cause. Additional objections will be discussed later in this opinion.

The Plan Commission deferred action until its March 7, 1974 meeting, at which time it rejected Skillken's petition for the platting of the Stateline site on the basis that "[I]t is not in the best interests of the residents in that area . . ." The Plan Commission also rejected the petition for platting and the request to rezone the Heatherdowns site for the reason that "[T]he subdivision as presented . . . does not meet the area requirements for the zoning. . . ."

Following this action by the Plan Commission the Toledo City Council preliminarily denied Skillken's request to rezone the Heatherdowns site on March 19, 1974. On March 21, 1974 the Plan Commission rescinded its prior approval for the Holland-Sylvania site, and on March 26, 1974 the Council formally rejected Skillken's request for rezoning the Heatherdowns site by passage of Resolution 1-74.

On May 28, 1974 the plaintiffs filed the present suit.

They sought a mandatory injunction to compel the members of the City Council of Toledo to rezone and plat the Heatherdowns site and to approve a plat for the Holland-Sylvania and Stateline sites so as to permit the construction of 130 low cost public housing units on said sites.

It was alleged that the action of the City Council and the Plan Commission was racially motivated by intentional and purposeful discrimination against black people who were in need of public housing.

The District Judge in his published opinion found a purposeful and intentional discrimination against black people on the part of the City Council and the Plan Commission, and directed counsel for plaintiffs to prepare an order granting relief to the plaintiffs.

The order, which was approved by the Court and entered on October 8, 1974, however, substantially deviated from the Court's published opinion. It provided that the defendants' acts—

> . . . without any regard to the defendants' intentions or motivations, are and have the effect of being racially discriminatory, of perpetuating racial residential segregation and that these actions deny plaintiffs and the members of their class equal housing opportunities. . . .

Thus, "in effect" discrimination was added, whereas the previous ground was purposeful and intentional discrimination, which was not proved.

But this was not all. The entire nature of the case was changed by the following order (which was not in the published opinion):

> AND IT IS FURTHER
>
> III
>
> ORDERED that in order to eliminate the past and continuing effects of racial residential segregation, the defendants shall, after consultation with plaintiffs, submit to this Court within ninety (90) days after the entry of this order, a comprehensive plan whereby the defendant City of Toledo, a comprehensive plan whereby the defendant City of Toledo and Toledo City Plan Commission, their members, officers, agents, employees, and all persons acting in concert and participation with them, shall affirmatively en-

gage themselves in substantial efforts to eliminate discriminatory barriers in the total housing supply and make housing in a broad choice of neighborhoods freely and fully available to minority persons.

AND IT IS FURTHER

ORDERED that following defendants' submission to the Court of the above plan, plaintiffs may submit to the Court within twenty (20) days thereafter any objections of alternative suggestions to such plan. (A. 64-65)

These provisions were patterned after orders in school desegration cases. They actually ordered integration of the residential neighborhoods of the entire city of Toledo, by means of low cost public housing, at public expense, and irrespective of zoning ordinances.

I

THE ATTEMPTED INTERVENTION
APPEAL NO. 74-2116

As before stated, the motion to intervene was filed within three days after the answer to the complaint was filed by the municipal defendants.

The motion was filed by four individual property owners and by the Ragan Woods Homeowners Association, representing about 140 owners of property in the Ragan Woods Subdivision, who are members of this class. The motion stated that there are questions of law and fact common to the class.

The common question of law and fact is the propriety of the actions of the municipal defendants in disapproving the requested rezoning and plat proposals for the Heatherdowns site referred to in the complaint.

The motion further stated that as neighboring property owners they would be damaged by the proposed zoning change and that they have rights and interests protected by statute and are entitled to intervene as a matter of right. They state that disposition of the present suit may impair or impede their ability to protect their interests. They also assert that they have a permissive right to intervene as shown by their proposed answer to the complaint, a copy of which was attached to the motion to intervene.

In their answer the intervenors state among other things that the Heatherdowns Boulevard site was zoned R-A for single-family residences, with minimum lot areas per family of 20,000-square feet and minimum lot width of 100 feet.

It is alleged that this zoning was proper and conformed to the most desirable, appropriate, and best use of the property affected thereby at the time it was zoned.

They allege that the individual property owners and the class they represent have expended over $10,000,000 in development of their respective properties in reliance on the existing zoning ordinances, and since said zoning there has been no zoning change of any part of the Ragan Woods-Heatherdowns area to R-2, 6000-square foot lots, as requested by plaintiffs and denied by the co-defendants.

They allege that the proposed zoning change would constitute "spot zoning", and that as a result the intervenors and others will suffer great deterioration and diminution in value of their respective properties, and that they will be irreparably damages, for which they have no adequate remedy at law.

Since the District Judge summarily denied the motion to intervene without a hearing and without taking evidence, we must assume that the factual allegations in the motion and in the accompanying answer are true.

Intervention as of right is governed by Rule 24(a) of the Federal Rules of Civil Procedure, which provides:

> (*a*) *Intervention of Right.* Upon timely application anyone shall be permitted to intervent in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subjct of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

In our opinion the District Judge erred in ruling that the application to intervene was untimely. It was filed within only three days after the municipal defendants had answered. Discovery had just been started. Council for the intervening petitioners had indicated that he would not ask for any delay in the expedited trial.

In *Wolpe* v. *Poretsky,* 144 F.2d 505 (D.C. Cir. 1944), intervention was permitted even after judgment in order to permit an adjoining property owner to appeal in a suit brought to enjoin enforcement of a zoning order which affected the value of adjoining property, and the Zoning Commission had decided not to appeal from an adverse judgment of the District Court.

We also note that without permitting the neighboring property owners to intervene and protect their property rights, the District Judge in his Memorandum Opinion commented on their conduct, as well as that of the public officials who are the defendants, stating:

> The records of the hearings before the Commission and the Council are a sad display of bigotry, intolerance and selfishness at its worst. With a great, but totally hypocritical, show of piety, public officials and

> neighboring property owners pretended that to develop groups of dwellings would only create new ghettos and that acceptable minority housing can only be obtained by building or buying individual houses throughout the city, or better still, by going out into the suburbs or rural areas beyond the city. The evidence in this case leaves no doubt that the actions and attitudes which have created segregation in Toledo are so strong and so persistent that only very postive court action can change the present housing patterns. (380 F.Supp. at 231)

Thus the Mayor of Toledo, the members of the City Council and the Plan Commission are all tarred with "bigotry, intolerance, and selfishness at its worst." The public officials and the neighboring property owners who were attempting to protect their properties from serious diminution in value were branded as hypocrites feigning a show of piety.

Rule 24(a) requires that the applicant claim an interest relating to the property or transaction which is the supject of the action.

The change in zoning was from lots of 20,000 square feet with 100 feet frontage, to lots of only 6,000 square feet. This would permit the construction of fifty low cost homes in a neighborhood where homes costing from $75,-000 to $100,000 have been built. The motion to intervene alleges facts which have not been contradicted that the change in the zoning law will result in a serious and substantial diminution of value of the properties in the Ragan Woods Subdivision.

We look to the law of Ohio for guidance as to the rights of property owners who have purchased and developed their properties relying on existing zoning ordinances.

Revised Code of Ohio § 713.13 provides:

> No person shall erect, construct, alter, repair or maintain any building or structure or use any land in violation of any zoning ordinance or regulation enacted pursuant to sections 713.06 to 713.12, inclusive, of the Revised Code, or Section 3 of Article XVIII, Ohio Constitution. In the event of any such violation, or imminent threat thereof, the municipal corporation, or the owner of any contiguous or neighboring property who would be especially damaged by such violation, in addition to any other remedies provided by law, may institute a suit for injunction to prevent or terminate such violation.

It will be noted that this statute grants to continuous or neighboring property owners the right to institute a suit for injunction to prevent not not only a violation but also a threatened violation.

The present suit in the District Court was not only a threatened violation but also it has actually resulted in a nullification of the zoning ordinance on which the property owners relied in the purchase and development of their properties.

Even prior to the enactment of Revised Code of Ohio § 713.13 the Ohio courts had upheld the right of a property owner to bring a suit to enjoin the erection of a structure in violation of a zoning ordinance.

In *Pritz* v. *Messer,* 112 Ohio St. 628 (1925), the Supreme Court of Ohio, in an opinion written by Judge Florence Allen, who later was appointed to our Court, held:

> A property owner, residing in a municipality in which a valid zoning ordinance is in full force and effect, has legal capacity to apply for an injunction against the erection of an apartment building upon a lot contiguous to her real property, upon the ground that the proposed structure will violate the zoning ordinance. (Syl. 3)

In *Rosenberg* v. *Mehl,* 37 Ohio App. 95 (1930), the Court held:

> In landowner's suit to have zoning ordinance declared unconstitutional, court abused its discretion in overruling contiguous property owner's motion to be made party defendant. . . . (Syl. 2)

The Court said at page 99:

> If the court of common pleas should grant the relief asked for, it would certainly deprive the plaintiff in error Rosenberg of his rights declared under the decision in the case of *Pritz* v. *Messer.* He would be barred from prosecuting an injunction to enforce the observance of the zoning laws as existing under the ordinances of the city, as this would mean an injunction against the carrying out of a judgment of a court of record, which judgment would be determinative of facts giving rise to plaintiff in error's cause of action. (*Id.* at 99-100)

Revised Code of Ohio § 713-13, enacted subsequent to *Pritz* and *Rosenberg,* extended the coverage from contiguous to neighboring property owners.

So, in the present case, like *Rosenberg,* the denial of the motion to intervene has barred the property owners "from prosecuting an injunction to enforce the observance of the zoning laws as existing under the ordinances of the city. . . ."

It is interesting to note that the Court of Appeals for the District of Columbia, in *Wolpe* v. *Poretsky,* 144 F.2d 505 (D.C. Cir.) *cert. denied,* 323 U.S. 777 (1944), cited *Rosenberg* as authority, in footnote 4. The Court held:

Rule 24(a) of the Federal Rules of Civil Procedure 28 U.S.C.A. following section 723c, provides for intervention of right "upon timely application • • • when the representation of the applicant's interest by existing parties is or may be inadequate *and the applicant is or may be bound by a judgment in the action;*" [italics supplied]. It seems clear that a judgment which declares a zoning order to be void would bind adjoining property owners to the extent of taking away their statutory right to an independent action based on the order. Otherwise, adjoining property owners could relitigate the issues in the case any time the plaintiff began construction, on the theory that their right to bring an independent action was not concluded by the decree. (*Id.* at 507)

As previously stated in *Wolpe,* the intervention was allowed after judgment so that the intervenor could appeal from a judgment from which the Zoning Commission should have appealed.

In our opinion the decisions of the Ohio courts in *Pritz* and *Rosenberg* and of the Court of Appeals for the District of Columbia in *Wolpe,* can further be justified on the ground that intervention was necessary to accord the property owners due process of law guaranteed by the Fifth Amendment.

In *Armstrong* v. *Manzo,* 380 U.S. 545, 552 (1965), Mr. Justice Stewart, who wrote the opinion for the Court, stated:

> A fundamental requirement of due process is "the opportunity to be heard." *Grannis* v. *Ordean,* 234 U.S. 385, 394. It is an opportunity which must be granted at a meaningful time and in a meaningful manner.

It is next contended that the property owners would be adequately represented by the Law Director and his assistants who were representing the City of Toledo, the Mayor, the City Council, and the Plan Commission. We disagree.

The municipal defendants were charged with maintaining a segregated city, and with racial bigotry, bias, hypocrisy, and with discrimination against Negroes.

There was no proof that race had anything to do with the adoption of the existing comprehensive zoning ordinance in effect at the present time. The plaintiffs were claiming that because of the conduct of the officials they were entitled to have the area rezoned.

The property owners, on the other hand, were interested solely in protecting the values of their own property which they did not want to be diminished by a change in the zoning.

The municipal defendants had enough to do to defend themselves against the charges leveled against them by the plaintiffs. They do not have the same interest in protecting the values of the homeowners' properties as do the homeowners themselves.

The defendants, City of Toledo, *et al.,* filed in the District Court a memorandum in support of the motion to intervene. They gave as the reason.

> . . . [T]he interests of the Intervenor-Defendants may well be different if not inconsistent with the interests of the Defendants, City of Toledo, et al., and therefore their interests may not be adequately represented by the present defendants.

This was plain notice to the District Judge that the attorneys for the City of Toledo, *et al.,* did not want to represent the property owners; that the interests of

their clients may well be different, if not inconsistent, with the interests of the property owners; and that, therefore, their interests may not be adequately represented.

It is not understandable that the District Judge under these circumstances would deny the motion to intervene when he was advised of a conflict of interest, which would have made it unethical for the City attorneys to represent the property owners without their consent. Canons of Professional Ethics of American Bar Ass'n, No. 6.

The City's Attorneys already had their hands full in representing the Plan Commission. The staff of the Plan Commission was co-operating with Skillken, *et al.*, and did not at first disclose to the Plan Commission the fact that the Skillken proposal was a TMHA Housing Project.

Under these circumstances we do not indulge in the presumption, suggested by plaintiffs, that the City, *et al.*, would adequately represent the property owners.

Reliance on our decision in *Woodland Market Realty Co.* v. *City of Cleveland*, 426 F.2d 955 (6th Cir. 1970), is misplaced. In *Woodland* property was condemned for urban renewal and a company owning a leasehold interest in the neighborhood claimed to be damaged because its customers had been removed. Its leasehold interest in the land remained intact.

In the present case the City of Toledo would not have any right to change the existing zoning ordinance after property owners had purchased their property relying on it, without first resorting to appropriate procedures. As we will point out later, neither did the District Judge, in attempting to exercise legislative functions, have any such right.

II

The City of Toledo is a municipal corporation with Home Rule Powers of self-government conferred on it by Article XVIII § 3 of the Constitution of Ohio. These powers are defined in its Charter which grants full power to the City to pass such ordinances as are expedient for maintaining and promoting the peace, good government and welfare of the City.

The zoning ordinance is codified in Chapter 9 of the Toledo Municipal Code, and it divides the City "into districts in accordance with a comprehensive plan for the purpose of limiting and regulating the height, bulk and location of buildings, set back building lines, area and dimensions of yards and other open spaces, and the use of buildings and other structures and of premises in such zones or districts, . . . all of which is done in the interest of the public health, safety, convenience or general welfare."

The Toledo ordinance requires notice to be given to the owners of adjoining, adjacent and neighboring land of any hearings on rezoning.

The hearings on the preliminary plattings were conducted before the Plan Commission, and hearings on the rezoning were conducted before the City Council. Property owners from the areas of all the three projects attended en masse and vigorously protested. They were all permitted to be heard. Skillken's attorney also attended and presented his views in favor of the platting and the rezoning.

No representatives of TMHA appeared at any of the hearings before the Plan Commission or the City Council to support the rezoning and the platting.

The property owners voiced their objection to all three projects on the ground that the projects would seriously depreciate the value of their homes. Objection to the

Stateline Road project was made also on the grounds of poor soil conditions and flooding.

The Plan Commission disapproved of the preliminary platting of the two projects. The City Council, by Resolution 1-74, rejected the rezoning of the Heatherdowns project.

The reasoning for the disapproval of the preliminary platting by the Plan Commission and for the rejection of the rezoning of the Heatherdowns site by the City Council is set forth at length in the transcripts of hearings before those bodies and in the testimony by way of deposition of Stratman Cooke, a member of the Commission and now its Chairman. Chairman Cooke is a Negro. The action of the Commission was by a unanimous vote.

These reasons were substantially as follows:

1—The TMHA projects in recent years had been a dismal failure. Projects had been started and were not completed. Projects which had been completed were unoccupied. Evidence of these facts was proffered when the Court rejected it as irrelevant.

2—The clustering of forty to fifty units of low-income housing was not the proper approach for the entire city as it created an isolated neighborhood within a neighborhood. The Commission suggested that developers be required to include some low-income homes in each new development. They also suggested an extension of TMHA's leased housing project and the building of public housing on scattered individual sites to distribute low-income housing throughout Toledo.

3—TMHA has neglected to meet with residents in the area of the proposed projects to explain their virtues and to endeavor to overcome any resistance.

4—The proposed projects would not produce orderly development of the land to obtain harmonious and stable

neighborhoods, and were not in the best interests of the public.

5—There was doubt about the adequacy of the Stateline site based on reports of neighbors as to past flooding and landfill problems.

All of these matters were required to be considered by the members of the Plan Commission and the City Council in the performance of their duty. None of them has any racial overtones.

It is also significant that neither Skillken or TMHA endeavored to meet with either the Plan Commission or the City Council after the rejection to work out a better and more acceptable plan for public housing.

We note that the District Judge passed upon evidence considered by the Plan Commission and the City Council, but he reached a different conclusion. The trouble is that he was not a member of either body, and further, he had no appellate jurisdiction to review their decisions.

The District Judge held that Resolution 1-74 enacted by City Council, denying rezoning of the Heatherdowns tract, was illegal and void. For the reasons stated in this opinion we disagree.

But assuming that Resolution 1-74, denying rezoning, was invalid, it would follow that the valid existing zoning ordinance requiring 20,000-square foot lots with 100-foot frontage would remain in full force and effect. This result, however, did not bother the District Judge, He simply ordered the City Council to pass another ordinance to rezone the tract to 9,000-square foot lots. The figure of 9,000 square feet was used rather than the figure of 6,000, contained in the written petition for rezoning, because counsel of Skillken had indicated that the higher figure was acceptable.

It is clear that in ordering the members of the City Council to pass a new zoning ordinance, the District Judge was exercising legislative powers which he did not possess.

We commented on this in *Mahaley* v. *Cuyahoga Metropolitan Housing Authority*, 500 F.2d 1087, 1092 (6th Cir. 1974), *cert. denied*, 43 U.S.L.W. 3088 Jan. 14, 1975, as follows:

> In oral argument one of counsel for appellees even went so far as to suggest that the single Judge could order individual councilmen to vote for a cooperation agreement. While this course of action might have been a way to order relief without exceeding jurisdictional bounds, we think such action would have been highly improper. Quite simply, it would have been a violation of the separation of powers with the court acting as a legislature.

The Supreme Court in *Griswold* v. *Connecticut*, 381 U.S. 479 at 482 (1965), used much stronger language than we did in *Mahaley, supra*. Mr. Justice Douglas, speaking for the Court, said:

> We do not sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions.

With equal propriety the members of Congress could be sued individually and charged with racism, hypocrisy, and bigotry and ordered by a Court to enact new legislation increasing economic and social problems for minorities.

Federal Courts do have jurisdiction and power to pass upon the constitutionality of Acts of Congress, but we are not aware of any decision extending this power in Federal Courts to order Congress to enact legislation. To do so

would constitute encroachment upon the functions of a legislative body and would violate the time-honored principle of separation of powers of the three great departments of our Government. This principle is equally applicable to the power of a Federal Judge to order a state legislative body to enact legislation. The enactment of legislation is not a ministerial function subject to control by mandamus, prohibition or the injunctive powers of a court.

III

Toledo's population in 1970 was 329,068, of whom 86% were white, 14% were black, and 1% other minority groups. 28% of the population, or 35,000 households, were eligible for public housing; 21% of those eligible were black, and 79% were white. Thus there are more than three times as many whites who need public housing than there are blacks needing housing.

The District Judge found that Toledo was a racially segregated city, with public officials who were bigots. He determined that the action of the Plan Commission and of the City Council was racially motivated. He also paid his respects to TMHA, stating:

> This example of bureaucratic ducking is typical of TMHA's pusillanimous approach to its responsibilities.

The fact is that black families are living in virtually all parts of Toledo. This was testified to on cross-examination of plaintiff's witness, Emerson Cole, a black member of Ohio Civil Rights Commission, who had lived in Toledo for forty-three years, and who testified as follows:

> Q. It is a fact, is it not, that there are black people living in virtually every area of the city of Toledo?
> A. Yes. (88a)

Mr. Cole further testified that Toledo had set up a Board of Community Relations, dedicated to resolve problems of housing discrimination, which Board works with him. (88a).

This can hardly be the work of bigoted public officials.

The fact that some black people, but not all, are concentrated in a certain area of the city, is no proof of official discrimination, and the District Judge was in error of inferring it.

Nor can the municipal defendants be held responsible for private discrimination or for discrimination by other bodies, or for the location of public housing. The present cooperation agreement did not give the defendants any voice in the selection of sites for housing.

Negro families have not been excluded from the Ragan Woods subdivision, nor have other minorities who have the money to purchase property there. In Ragan Woods there are also first and second generation Americans of Greek, Italian, Polish, Hungarian, Czechoslovakian, Irish, English, Swedish, and Scottish descent.

The District Court erred in applying the compelling interest test, rather than a rational basis test, in determining whether Toledo's legislation was invalid. The ruling conflicted with our decision in *Mahaley* v. *Cuyahoga Metropolitan Housing Authority, supra.*[4]

Lindsey v. *Normet,* 405 U.S. 56 (1972), holds that no one has a constitutional right to adequate public housing. We

[4] Even applying the compelling interest test, it is clear that Toledo had a valid public interest to protect its zoning laws from wholesale nullification, a result which would disrupt the entire community and woud inflect heavy losses on many innocent people. Such zoning laws, enacted under the police power, "are essential to orderly community development." *Forest City Enterprises, Inc.* v. *Eastlake,* 41 Ohio St.2d 187, 189, *cert. granted* Oct. 14, 1975, 44 U.S.L W. 3222.

rely also on *Citizens Comm. for Faraday Wood* v. *Lindsay,* 362 F.Supp. 651 (S.D.N.Y. 1973), which has since been affirmed by the Second Circuit Court of Appeals, 507 F.2d 1065 (2d Cir. 1974).

In *Faraday Wood* Judge Lumbard stated:

> However, even if we adopted the standards of these cases the plaintiffs have failed to show that the city acted in bad faith. AMIH knew that this proposal had to be approved by the New York City Board of Estimate before the parties could enter into a binding contract. The Board of Estimate is a political body so AMIH knew that it would consider expressions of opinion by members of the public. It seems to us that it is a proper exercise of discretion for HDA to terminate a project when it feels that the Board of Estimate is unlikely to approve it because of public protest and political considerations. (507 F.2d at 1072)

In *Palmer* v. *Thompson,* 403 U.S. 217 (1971), the Court held that a neutral policy which had a greater impact on a minority group was not invalid.

The zoning laws in the present case are not inherently suspect. To apply the compelling interest test would virtually invalidate all forms of state legislation where people are affected differently.

The compelling interest rule was rejected in *Village of Belle Terre* v. *Boraas,* 416 U.S. 1 (1974); *San Antonio School Dist.* v. *Rodriguez,* 411 U.S. 1 (1973); *James* v. *Valtierra,* 402 U.S. 137, 142 (1971); *Dandridge* v. *Williams,* 397 U.S. 471 (1970); *McGowan* v. *Maryland,* 366 U.S. 420 (1961); *Citizens Comm. for Faraday Wood* v. *Lindsay, supra; Ranjel* v. *City of Lansing,* 417 F.2d 321 (6th Cir. 1969), *cert. denied,* 397 U.S. 980 (1969), *rehearing denied,* 397 U.S. 1059 (1970).

It is significant that no attack has been made here on Toledo's comprehensive zoning ordinance. It was neutral legislation enacted long before the controversy in the present case arose.

The constitutionality of Ohio's zoning laws was first upheld by the Supreme Court in *Euclid* v. *Ambler Realty Co.*, 272 U.S. 365 (1926). *Euclid* was followed in *Berman* v. *Parker*, 348 U.S. 26 (1954), and most recently in *Village of Belle Terre* v. *Boraas*, 416 U.S. 1 (1974). In *Belle Terre* Mr. Justice Douglas, who wrote the opinion for the Court, stated:

> We deal with economic and social legislation where legislatures have historically drawn lines which we respect against the charge of violation of the Equal Protection Clause if the law be "'reasonable not arbitrary'" (quoting *Royster Guano Co.* v. *Virginia*, 253 U.S. 412, 415) and bears "a rational relationship to a [permissible] state objective." *Reed* v. *Reed*, 404 U.S. 71, 76. (p. 8)

In *James* v. *Valtierra*, 402 U.S. 137 (1971), the Supreme Court upheld California's requirement of referendum approval by the voters of low cost housing. *Cf. Ranjel* v. *City of Lansing*, 417 F.2d 321 (6th Cir. 1969), *cert. denied*, 397 980, *rehearing denied*, 397 U.S. 1059 (1970), for referendum on rezoning.

The entire complaint here is that the legislative body of Toledo refused to rezone.

In Ohio zoning is a legislative function. *Forest City Enterprises, Inc.* v. *Eastlake*, 41 Ohio St.2d 187 (1975), *cert. granted* Oct. 14, 1975, 423 U.S. 890, 96 S.Ct. 185, 46 L.Ed. 2d 121.

In our opinion there was a rational basis for the enactment of Toledo's zoning ordinance and also for the actions of the Plan Commission in denying platting and of the

City Council in rejecting rezoning of the Heatherdowns project.

Recently the Supreme Court held that plaintiffs bringing suits to compel housing in municipalities must have standing to sue. *Warth* v. *Seldin*, 422 U.S. 45, 95 S.Ct. 2197, 45 L.Ed. 2d 343 (decided June 25, 1975).

Under date of October 14, 1975 the Supreme Court granted certiorari in the case of *Forest City Enterprises, Inc.* v. *Eastlake, supra*, which invalidated. for violation of the Fourteenth Amendment, a charter provision of a municipality requiring land use changes to be ratified by the voters in a city-wide election.

Although the complaint in this case related only to the action of the Plan Commission and the City Council in respect to three sites which Skillken desired to develop, the broad order entered by the District Judge subsequent to his published opinion converted the nature of the case to that of an action to desegregate the residential areas of the entire city of Toledo, and, like the procedure in a school desegregation case, the municipal defendants were ordered to submit to the Court within ninety days a comprehensive plan for desegregation of housing.

Under this broad order all zoning laws in conflict therewith would be invalidated. Low cost public housing could move into the most exclusive neighborhoods in the metropolitan area and property values would be slaughtered. Innocent people who labored hard all of their lives and saved their money to purchase homes in nice residential neighborhoods, and who never discriminated against anyone, would be faced with a total change in their neighborhoods, with the values of their properties slashed. All of this would be accomplished simply by an order of a Federal Judge, and at the expense of the taxpayers.

It is submitted that Congress never vested any such power in Federal Judges.

Members of the City Council did not cause nor create the concentration of black people in Toledo, and they are under no legal obligation to deconcentrate the area or to change the zoning laws to bring about deconcentration.

Nor are the city officials responsible for private discrimination, most of which, we believe, occurred prior to Ohio's Civil Rights Act, Ohio Rev. Code § 4112.01 *et seq.*, and the decision of the Supreme Court in *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409 (1968), which afford adequate remedies for private racial discrimination in housing.

It was argued that housing units were constructed in Toledo in the areas of racial concentration. It should be remembered that ever since the 1968 co-operation agreement the location of housing units was the sole province of TMHA.

Nor do we regard the refusal of the City Council to rezone and the Plan Commission to replat, as obstructing the rights of minorities to housing, upon which an inference of discrimination "in effect" may be drawn against those bodies.

Nor can the city officials be blamed for the substandard public housing already constructed by TMHA, or for TMHA's failure to complete existing projects, or for TMHA's permitting projects to remain vacant or in a state of disrepair, as was described in proof which was excluded by the District Court but was duly proffered.

We live in a free society. The time has not yet arrived for the courts to strike down state zoning laws which are neutral on their face and valid when passed, in order to permit the construction at public expense of large numbers of low cost public housing units in a neighborhood where they do not belong, and where the property owners, relying on the zoning laws, have spent large sums of money to build fine homes for the enjoyment of their families.

A federal court ought not to exercise state legislative functions. It is without power to do so, and furthermore it has not developed proficiency in that field.

There is not an iota of evidence that any of the property owners ever discriminated against black people, or were in any way responsible for their concentration in certain areas of Toledo. These property owners have constitutional rights just as dear to them as they are to the minorities. Their constitutional rights included the right to own property and not to have its value destroyed without due process of law.

It is submitted that it should not be necessary to violate the constitutional rights of the majority of the population of a city in order to grant relief to a minority group.

Relative to the platting of Holland-Sylvania and State-line sites, the District Court, in our opinion, did not give adequate consideration to the nonracial reasons stated by the Plan Commission and the City Council in denying the platting, and did not consider the rights of these areas' property owners who opposed the platting. These rights must be determined upon the remand.

The order of the District Court further finds that the City violated the cooperation agreement but does not state in what respect.

The plaintiffs in their brief (p. 23) state that the cooperation agreement—

> . . . requires the city to cooperate with TMHA in the development of these units, including the making of reasonable and necessary changes in zoning for the development of TMHA projects.

Plaintiffs neglected to state that such cooperation was limited by the first sentence in the paragraph, which expressly states:

> Insofar as the Municipality may lawfully do so . . . .

It would not be lawful for Toledo to contract away or to restrict its legislative powers, nor to delegate them to TMHA. *Forest City Enterprises, Inc.* v. *Eastlake, supra;* 10 Ohio Jur.2d, *Constitutional Law,* §§ 239, 315. In *Forest City* the Court stated:

> In Ohio, the power to zone or rezone, via the passage or amendment of a comprehensive zoning ordinance, is clearly a legislative function. 41 Ohio St. 2d at 189)

In that case also, the Court cited *Berg* v. *Struthers,* 176 Ohio St. 146 (1964); *Tuber* v. *Perkins,* 6 Ohio St.2d 155 (1966); *Donnelly* v. *Fairview-Park,* 13 Ohio St.2d 1 (1968).

Skillken obviously recognized this fact when he applied to the City Council for rezoning and to the Plan Commission for platting. It would not have been necessary for Skillken to do this if the cooperation agreement validly waived the zoning laws.

The fact is that over the years from 1938 the City did furnish police and fire protection and other services required by the cooperation agreement. It would appear that the only violation claimed by the plaintiffs was that the city did not change its zoning laws and approve preliminary platting, in the present case. It was not required to make such changes unless lawfully approved by the governing body of the city.

The judgment of the District Court is reversed and the cause is remanded for dismissal of the complaint with respect to the rezoning and platting of Heatherdowns.

With respect to the platting of Holland-Sylvania and Stateline sites the cause is remanded for further consideration by the District Court after the parties have endeavored to work out an amicable solution of their problems which include scattered housing sites and housing in

new developments, and consideration of the rights of property owners in the two areas.

Each party will pay his own costs in this appeal.

PHILLIPS, Chief Judge. (Concurring in the result.) I concur in the results reached in the opinion prepared by Judge Weick.

My opinion is that the record contains no support for the District Court's statement that the actions of the City Council and the Plan Commission were a "sad display of bigotry, intolerance, and selfishness at its worst." 380 F. Supp. at 231. Not only is this finding clearly erroneous, but it is also likely to be counterproductive in the sensitive and controversial circumstances of this case.

I also agree that the record of this case does not provide a basis for the action of the District Court in ordering that the City of Toledo submit a comprehensive plan for the elimination of all discriminatory barriers in housing.

As this court said in *Garrett* v. *City of Hamtramck,* 503 F.2d 1236, 1249 (6th Cir. 1974), affirmative provisions in a decree "should be no greater than required because courts are illequipped to administer the details of a municipality's affairs." In my opinion the requirement that Toledo develop a sweeping plan of affirmative action is unnecessary in this case. More important, it would deeply involve the District Court in complex and delicate problems of city planning that are best left to the municipal government and to the various administrative agencies.

Appeal No. 74-2116 is from the decision of the District Court denying the petition of Ragan Woods Homeowners Association, et al., to intervene as parties defendant. I agree that these parties had a right to intervene under Fed. R. Civ. P. 24(a) and that the District Court com-

mitted reversible error in denying leave to intervene under the facts and circumstances of this case.

I interpret the opinion prepared by Judge Weick to make final disposition of only one issue—the rezoning of the Heatherdowns tract. I agree that the decision of the District Court should be reversed on this issue and that the complaint should be dismissed insofar as it seeks the rezoning and platting of Heatherdowns.

I further agree that the issues of platting the Holland-Sylvania and Stateline sites should be remanded for further consideration after the parties have endeavored to work out an amicable solution to their problems. All the parties to this appeal are, or should be, interested in the development of the City of Toledo, where all citizens, black and white, will have equal opportunities for adequate housing, without discrimination. The parties are, or should be, interested in avoiding a situation for Toledo such as is described in *United States* v. *City of Black Jack, Missouri*, 508 F.2d 1179 (8th Cir. 1974), *cert. denied*, 422 U.S. 1042 (1975). These are problems that should be resolved effectively by persons of good will, working at the level of local government, and not by mandates of federal courts.

If parties are not successful in working out an amicable settlement of their differences, the District Court will have another opportunity to pass upon the issues in the light of all evidence then on file, including the evidence heard on remand.

Certiorari Granted—Vacated and Remanded (Jan. 25, 1977)

No. 75-1002. JOSEPH SKILKEN & CO. ET AL. *v.* CITY OF TOLEDO ET AL. C. A. 6th Cir. Certiorari granted, judgment vacated and case remanded for further consideration in light of *Village of Arlington Heights* v. *Metropolitan Housing Development Corp., ante*, p. 252, and *Hills* v. *Gautreaux*, 425 U.S. 284 (1976). Reported below: 528 F. 2d 862.

(Caption Omitted in Printing)

Decided and Filed June 21, 1977.

Before: Phillips, Chief Judge, Weick and Peck, Circuit Judges.

Per Curiam. The Supreme Court remanded for further consideration in light of *Arlington Heights* v. *Metropolitan Housing Dev. Corp.*, 429 U.S.—— (Jan. 11, 1977), and *Hills* v. *Gautreaux*, 425 U.S. 284 (1976). These two cases were decided by the Supreme Court subsequent to our decision reported in 528 F.2d 867 (6th Cir. 1975).

The parties have filed briefs, at the direction of this court, stating their views as to the disposition we should make on the remand. Upon consideration, we are of the opinion that the result reached in our reported opinion is consistent with each of the above-cited decisions subsequently rendered by the Supreme Court.

In its petition for writ of certiorari in the Supreme Court, Skilken[1] relied upon the decision of the Seventh Circuit in *Metropolitan Housing Development Corp.* v. *Village of Arlington Heights*, 517 F.2d 409 (1975). The Supreme Court reversed the Seventh Circuit in *Arlington Heights* v. *Metropolitan Housing Dev. Corp.*, 429 U.S. — (Jan. 11, 1977). We construe the decision of the Supreme Court to support our reported opinion in the present case. If the opinion of the Supreme Court in *Arlington Heights* had been available to this court, we would have cited it as the principal authority in support of our decision.

Further, we conclude that *Hills* v. *Gautreaux*, 425 U.S. 284 (1976) is consistent with the result reached in our reported decision. In that case the Supreme Court stated:

[1] By a footnote, Skilken informs us that its name was misspelled in both the opinion of the District Judge and in our reported opinion, and that the correct spelling is "Skilken." It was spelled "Skillken" in the complaint filed by Skilken in the district court.

> Use of the § 8 program to expand low-income housing opportunities outside areas of minority concentration would not have a coercive effect on suburban municipalities. For under the program, the local governmental units retain the right to comment on specific assistance proposals, to reject certain proposals that are inconsistent with their approved housing-assistance plans, and to require that zoning and other land use restrictions be adhered to by builders. 425 U.S. at 305.

Here, the alleged constitutional violation related to refusal of the Toledo Plan Commission to approve preliminary platting for two sites, and refusal of the City Council to rezone and approve preliminary platting of the third site. The platting issues for the two sites have been remanded by this court to the district court for further consideration. We disposed finally of only the zoning issue.

Accordingly, we adhere to our previous decision. The judgment of the district court is reversed and the cause is remanded for dismissal of the complaint with respect to the rezoning and platting of Heatherdowns. With respect to the platting of Holland-Sylvania and Stateline sites, the cause is remanded for further consideration by the district court after the parties have endeavored to work out an amicable solution of their problems, which include scattered housing sites and housing in new developments, and consideration of the rights of property owners in the two areas.

Costs in connection with the proceeding on the remand are assessed against Skilken and Co.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

(1) 42 U.S.C. 1981

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

(2) 42 U.S.C. 1982

All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

(3) 42 U.S.C. 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

(4) 42 U.S.C. 2000d

No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

(5) The relevant provisions of Title VIII of the Civil Rights Act of 1968, 42 U.S.C. 3601-3619, are as follows:

(a) Section 3604

As made applicable by section 3603 of this title and except as exempted by sections 3603(b) and 3607 of this title, it shall be unlawful—

(a) To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, or national origin.

(b) Section 3612(a)

The rights granted by sections 803, 804, 805 and 806 may be enforced by civil actions in appropriate United States district courts without regard to the amount of controversy and in appropriate State or local courts of general jurisdiction.

(c) Section 3612(c)

The court may grant as relief, as it deems appropriate, any permanent or temporary injunction, temporary restraining order, or other order, and may award to the plaintiff actual damages and not more than $1,000 punitive damages, together with court costs and reasonable attorney fees in the case of a prevailing plaintiff: *Provided,* That the said plaintiff in the opinion of the court is not financially able to assume said attorney's fees.

(d) Section 3617

It shall be unlawful to coerce, intimidate, threaten, or interfere with any person in the exercise or en-

joyment or, or on account of his having exercised or enjoyed, or on account of has having aided or encouraged any other person in the exercise or enjoyment of, any right granted or protected by section 803, 804, 805, or 806. This section may be enforced by appropriate civil action.

(6) Section 1 of the Thirteenth Amendment provides:

> Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction

(7) Section 1 of the Fourteenth Amendment provides in relevant part:

> [N]or shall any State . . . deny to any person within its jurisdiction the equal protection of the laws.

Supreme Court of the United States

October Term, 1977

No. 77-443

JOSEPH SKILKEN AND COMPANY, *et al.*,
Petitioners,

vs.

CITY OF TOLEDO, OHIO, *et al.*,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENTS IN OPPOSITION

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STATEMENT OF THE CASE

The petitioners herein apparently seek a writ of certiorari to the United States Court of Appeals for the Sixth Circuit in both Case No. 74-2116 entitled *Joseph Skilken & Co., et al. v. City of Toledo, et al., Ragan Woods Homeowners Association, et al.*, and in Case No. 74-2320 entitled *Joseph Skilken & Co., et al. v. City of Toledo, et al.*

Case No. 74-2320 entitled *Joseph Skilken & Co., et al. v. City of Toledo, et al.*, was commenced by the filing of a Complaint in the United States District Court for the Northern District of Ohio, Western Division, on May 28, 1974, entitled *Joseph Skilken and Company, et al. v. City*

of Toledo, et al., Case No. C74-202. Following a pretrial conference on June 5, 1974, various stipulations between the parties, and the Order of the Court of June 18, 1974, the defendants filed their Answer on June 25, 1974. The trial was placed on an accelerated schedule and, over the objection of the defendants, the trial commenced on July 15, 1974, and ended on July 19, 1974. Thus the evidence was completed and the case submitted to the Court less than seven weeks after the Complaint had been filed. The trial was bifurcated by the District Court, with the issues of injunctive and declaratory relief being heard by the Court and the issue of damages reserved for a later trial by jury.

Within three days after the answer to the Complaint was filed, a motion to intervene was filed by the Ragan Woods Homeowners Association and by individual property owners. Other motions to intervene were filed. The Ragan Woods Homeowners Association and others who attempted to intervene perfected an appeal to the Sixth Circuit Court of Appeals, which is Case No. 74-2116 entitled *Joseph Skilken & Co., et al. v. City of Toledo, et al., Ragan Woods Homeowners Association, et al.*, which was consolidated with Case No. 74-2320 for oral argument. Both cases were disposed of by the Opinion of the Sixth Circuit Court filed December 10, 1975.

Following the accelerated trial, the District Court took the case under consideration and on August 28, 1974 issued its Memorandum Opinion (Pet. App. 1A). On October 8, 1974, the Court issued its final Order regarding the declaratory and injunctive relief to be granted to the plaintiffs (Pet. App. 21A).

On October 18, 1974, the defendants, the City of Toledo, et al., filed their Notice of Appeal with the District Court,

and on that same date the plaintiffs filed a Motion to expedite the certification of the record to the Circuit Court. On October 21, 1974, the District Court ordered that the certified record on appeal be transmitted to the Circuit Court by October 25, 1974.

On December 11, 1974, the Clerk of the Circuit Court docketed the defendants' Appeal and the briefing schedule was accelerated so as to require the defendants-appellants' Brief to be filed with the Court on or before January 6, 1975. The plaintiffs filed no cross appeals in the instant matter.

The cases were argued to the Sixth Circuit Court of Appeals on February 3, 1975. On December 10, 1975, the Sixth Circuit Court of Appeals announced and filed its decision and Opinion (Pet. App. 27A).

On January 15, 1976, Plaintiffs filed a Petition for Writ of Certiorari. On January 25, 1977, this Court granted the Writ of Certiorari and vacated the December 10, 1975, judgment of the Court of Appeals, remanding the case for further consideration in light of *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, and *Hills v. Gautreaux*, 425 U.S. 284. Both of these decisions were rendered by this Court subsequent to the decision of December 10, 1975, by the Court of Appeals. On remand, the Court of Appeals held "(u)pon consideration, we are of the opinion that the result reached in our reported opinion is consistent with each of the above cited decisions subsequently rendered by the Supreme Court."

Thereafter Plaintiffs filed this Petition for Writ of Certiorari.

STATEMENT OF THE FACTS

The original Complaint filed by the plaintiffs herein claimed jurisdiction under Sections 42 U.S.C. 1401, *et seq.*; 42 U.S.C. 1981, 1982, 1983, 2000 (d), 3601, *et seq.* and the Thirteenth and Fourteenth Amendments to the United States Constitution. The District Court found jurisdiction pursuant to 28 U.S.C. 1331 and 1343 and 42 U.S.C. 3612 and 3617.

The plaintiffs are Joseph Skilken and Company (hereinafter Skilken), a corporation engaged in the development and construction of residential dwelling units; the Toledo Metropolitan Housing Authority (hereinafter TMHA); Sandra Hueston and Jose Maldonado, who claim to represent a class of persons defined by the District Court as: "All low income minority persons residing in the Toledo Metropolitan Area, who, by virtue of their race and poverty, are unable to secure decent, safe, and sanitary housing in the City of Toledo, at rents or prices which they can afford without assistance from the Toledo Metropolitan Housing Authority (TMHA) and who are eligible for the Turnkey III Housing Program."

The defendants in the case are as follows: The City of Toledo (hereinafter City), a body corporate and politic established and organized under the laws of the State of Ohio; Harry Kessler, the elected Mayor of the City of Toledo and a member of the Toledo City Council; Defendants Cook, Copeland, Daoust, Douglas, Galvin, Nies, Pietrykowski and Reddish are the duly elected Council members of the City of Toledo; the defendant, City Plan Commission (hereinafter Commission), a commission established and organized under the statutes of the State of Ohio, Ohio Revised Code Sections 3735.27, *et seq.*, and the ordinances of the City of Toledo; Defendants Burke, Cooke,

Martin, Schimmel and Stoepler are members of the Commission appointed pursuant to the statutes of the State of Ohio and the ordinances of the City of Toledo. Unless specifically indicated, the defendants will hereinafter be collectively referred to as the "defendants."

REASONS FOR DENYING THE WRIT

A. CERTIORARI SHOULD BE DENIED IN CASES WHICH INVOLVE SOLELY A QUESTION OF THE WEIGHT OF THE EVIDENCE.

The gravamen of petitioners' complaint is dissatisfaction with the Appellate Court's assessment of the evidence. The legal analysis set forth in support of petitioners' claim of conflict among the Circuits is predicated upon inferences, conclusions, assumptions, and evaluations which are contrary to the facts as found by the Court of Appeals. In essence, petitioners are disputing, either directly or indirectly, every important factual finding which the Appellate Court deemed relevant to its decision. At page five of their Petition for Writ of Certiorari, Petitioners say:

> "The facts on which this Petition is based are contained in the record made at trial. Most of the facts are succinctly set forth in the District Court's opinion. In the course of its opinion reversing the judgment of the District Court, the Court of Appeals ignored certain key facts found by the lower court and expressed some disagreement with certain of the trial court's conclusions. The appellate court, however, did not purport to hold the District Court's findings clearly erroneous. *Plaintiffs will note those areas of disagreement in this Statement of the Case*, with appropriate references to the record." (emphasis added)

A few specific examples will serve to demonstrate the fundamental disagreement between petitioners and the Court of Appeals with regard to the sufficiency of the proof concerning discriminatory intent and effect. The Court of Appeals rejected petitioners' claim that Toledo is a racially segregated city. The Court found that black families are living in "virtually all parts of Toledo and that blacks have not been excluded from the subdivisions in question." *Joseph Skilken & Co. v. City of Toledo,* 528 F.2d 867 at 879 (Sixth Cir. 1975). The Appellate Court further concluded that petitioners had failed to demonstrate the existence of official discriminatory intent, and that the District Court was in error in inferring such a motive from the record. *Joseph Skilken & Co., supra,* at 879.

The definition of the class of plaintiffs as originally alleged in the complaint herein and subsequently certified by the District Court by its order of October 8, 1974 (page 21A of the Petition for Writ of Certiorari), is those "eligible for the Turnkey III Housing Program." The Appellate Court also used eligibility in defining the class of persons affected by the actions of the Plan Commission and the City Council. The Appellate Court found from the evidence that 79 percent of those eligible for public housing in Toledo are white. Petitioners now disagree with this definition and prefer to include only those people on TMHA's waiting list in the class of persons affected by the governmental action. The evidence pertaining to the racial composition of the group entitled to housing assistance in Toledo demonstrates that public housing is not black housing in the context of this case, and is probative evidence that the decisions of the city officials were not discriminatory in either purpose or effect. Thus the Court held that the governmental agencies and the residents of the neighborhoods concerned have a legitimate interest in

preserving the value of their homes, and such a goal is not racially discriminatory *per se,* particularly where 79 percent of those eligible for housing assistance are white.

The Court of Appeals has evaluated the record on two separate occasions, once in the appeal from the judgment of the District Court, and again on remand from this Court. In order to reach the statutory and constitutional claims asserted by petitioners, this Court would first be required to weigh the evidence and make a determination that the findings of the Appellate Court are clearly erroneous. Only after the instant case has reached such posture would it be possible to determine the question of conflict among the circuits. This Court has reiterated on numerous occasions that certiorari will be denied in cases involving solely a question of whether the Court of Appeals fairly assessed the record and made correct factual conclusions, *N.L.R.B. v. Pittsburgh Steamship Co.,* 340 U.S. 498 (1951); *Rogers v. Missouri P.R. Co.,* 352 U.S. 559 (1957) (Separate opinions of Justices Frankfurter, Harlan and Burton); *U. S. v. Johnson,* 268 U.S. 220 (1925); *Southern Power Co. v. North Carolina Public Service Co.,* 263 U.S. 508 (1924). The Writ of Certiorari should be denied accordingly.

B. THERE IS NO CONFLICT AMONG THE CIRCUITS.

Petitioners claim to find a conflict between the Sixth Circuit's decision in the instant case and *United States v. City of Black Jack,* 508 F.2d 1179 (Eighth Cir. 1974), *cert. denied,* 422 U.S. 1042 (1975); *Metropolitan Housing Development Corp. v. Village of Arlington Heights,* 558 F.2d 1283 (Seventh Cir. 1977); *Resident Advisory Board v. Rizzo,* ..... F.2d ..... (Third Cir. August 31, 1977). Petitioners apparently claim that the Sixth Circuit has rejected the

proposition that a *prima facie* case of violation of Title VIII can be established by showing that the action in question had a racially discriminatory effect. There is nothing in the opinion by the Sixth Circuit which would suggest that it has rejected the "effects standard". The plain fact is that the Sixth Circuit found that the governmental actions in question did not have a racially discriminatory effect.

The Sixth Circuit said:

> "Toledo's population in 1970 was 329,068, of whom 86% were white, 14% were black, and 1% other minority groups. 28% of the population, or 35,000 households, were eligible for public housing; 21% of those eligible were black, and 79% were white. Thus there are more than three times as many whites who need public housing than there are blacks needing housing." 528 F.2d 867, at 878.

Not only are there three times as many whites as blacks who need public housing, but the percentage of those eligible is very nearly equivalent to the percentage of minorities in the overall population of the city.

Likewise, the Sixth Circuit found that the actions by the City of Toledo did not result in the perpetuation of racial segregation or the prevention of interracial relationships. Thus the Sixth Circuit Court of Appeals said:

> "The fact is that black families are living in virtually all parts of Toledo. This was testified to on cross-examination of plaintiff's witness, Emerson Cole, a black member of Ohio Civil Rights Commission, who had lived in Toledo for forty-three years, and who testified as follows:
>
> Q. It is a fact, is it not, that there are black people living in virtually every area of the city of Toledo?

> A. Yes. (88a)
>
> Negro families have not been excluded from the Ragan Woods subdivision, nor have other minorities who have the money to purchase property there. In Ragan Woods there are also first and second generation Americans of Greek, Italian, Polish, Hungarian, Czechoslovakian, Irish, English, Swedish, and Scottish descent."*

Simply stated, the Sixth Circuit held that the decisions of public officials, acting within the scope of their authority and pursuant to a comprehensive and facially neutral zoning ordinance, do not violate Title VIII in the absence of discriminatory effect or purpose. The instant case does not involve the issue of the proper test or standard to be applied in ascertaining whether a Title VIII violation has occurred. At bottom, petitioners are raising factual and not legal questions. All of the following issues were fully considered by the Sixth Circuit and resolved against petitioners on the basis of the *evidence*: (1) The discriminatory impact or effect of the government's decision denying zoning changes or disapproving plats; (2) The motive or interest of the governmental officials in taking the actions complained of; (3) The degree to which public officials are responsible for alleged racial discrimination in Toledo; and (4) The extent to which the officials in question may consider property values in determining requests

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*The Seventh Circuit in *Arlington Heights, supra,* analyzed the potential discriminatory effect of governmental actions from two aspects: (1) the disparate effect, if any, on different racial groups, which the court termed "the first sense"; and (2) the possibility of perpetuating racial segregation and preventing interracial relationships which the court termed "the second sense." This analysis is very similar to that of the Sixth Circuit as indicated by the two quotations set forth in the body hereof. Although the Sixth Circuit did not utilize these specific terms, the court found no disparate effect from the governmental actions, and also found that Toledo was not a segregated city.

for zoning changes. The Court of Appeals held that petitioners failed to prove a *prima facie* case under Title VIII, as to either discriminatory purpose or effect.

In fact the Sixth Circuit Court of Appeals specifically found that the action of the City Council and the Plan Commission did not result in an "in effect" discrimination. The Court said:

> "Nor do we regard the refusal of the City Council to rezone and the Plan Commission to replat, as obstructing the rights of minorities to housing, upon which an inference of discrimination 'in effect' may be drawn against those bodies."

(1) The Seventh Circuit's decision in Metropolitan Housing Development Corp. v. Village of Arlington Heights, 558 F.2d 1283 (Seventh Cir. 1977).

Petitioners contend that the Sixth Circuit's decision in the instant case conflicts with that of the Seventh Circuit in *Arlington Heights, supra.* Petitioners claim that a showing of discriminatory effect is sufficient to establish a Title VIII violation. As hereinbefore pointed out, the Sixth Circuit specifically found that the decisions under consideration in the *Skilken* case did not result in a discriminatory effect. In any event, even the decision by the Seventh Circuit in *Arlington Heights* did not hold that discriminatory effect, in and of itself, was sufficient to establish a violation of Title VIII [42 U.S.C. § 3604 (a)] by a governmental entity:

> "Although we agree that a showing of discriminatory intent is not required under section 3604 (a), we refuse to conclude that every action which produces discriminatory effects is illegal. Such a *per se* rule would go beyond the intent of Congress and would lead courts into untenable results in specific cases. (Citations omitted) Rather, the courts must use their discretion in deciding whether, given the particular circumstances of each case, relief should be granted under the statute." *Arlington Heights, supra,* at 1290.

The racial composition of the City of Toledo is so unlike that of the village of Arlington Heights that any attempt to equate the two is meaningless. In 1970 the City of Arlington Heights had a population of 64,884, of whom 27 were black. That is, Arlington Heights was a 99 96/100 percent pure white city. The Chicago metropolitan area, of which Arlington Heights is a part, was 82 percent white, and 18 percent black. By contrast, Toledo's population in 1970 was 329,068, of whom 86 percent were white, 14 percent were black, and 1 percent other minority groups. Toledo had black people living in virtually every area of the city. Consequently, rejection of the housing under consideration in the instant case (wherein 79 percent of those eligible for such housing were white) did not have any racially discriminatory effect in the *Arlington Heights* "second sense."

In the Chicago metropolitan area 40 percent of those eligible for the housing under consideration in the *Arlington Heights* case were black. Since the proposal under consideration in the *Arlington Heights* case was for 190 units (even if you assume that the prospective black occupants of those units would have no children) such units would have been occupied by approximately 155 to 160 blacks. Such occupancy would have resulted in an increase of 600 percent in the total black population in the village of Arlington Heights.

Even under these very extreme circumstances, the Seventh Circuit held that "it is unclear . . . whether the Village's refusal to rezone would necessarily perpetuate

segregated housing in Arlington Heights." *Arlington Heights, supra,* at 1291. The Court stated that such a determination would depend on the amount of land within the village's corporate limits which was properly zoned for multiple family dwellings and on which the village would have no objection to the construction of a low cost housing project. Therefore, even under these extreme circumstances, the Seventh Circuit Court of Appeals was unwilling to find a discriminatory effect and remanded the case to the District Court to take additional evidence pertaining to the availability of alternate sites.

In the *Arlington Heights* case, the Seventh Circuit found that even though 40 percent of the people in the Chicago metropolitan area eligible for public housing were black, that was a "relatively weak" showing of discriminatory effect in the *Arlington Heights* "first sense." *Arlington Heights, supra,* at 1291. That "relatively weak" finding was made in spite of the fact that 18 percent of the people in the Chicago metropolitan area were black and that, therefore, a decision affecting public housing affected over twice the percentage of blacks as existed in the population as a whole.

By contrast, those eligible for public housing in the City of Toledo were 79 percent white and only 21 percent black. This percentage of distribution very closely parallels the percentage distribution of blacks and whites in the population of the city as a whole (86 percent white—14 percent black).

(2) The Eighth Circuit's decision in United States v. City of Black Jack, 508 F.2d 1179 (Eighth Cir. 1974), cert. denied 422 U.S. 1042 (1975).

Petitioners contend that the Sixth Circuit's decision in the instant case conflicts with that of the Eighth Circuit in *Black Jack, supra.* Petitioners, however, never analyze any of the facts of the *Black Jack* case.

The uncontested facts in that case were that:

> ". . . at the relevant time the area which is now the City of Black Jack was virtually all white, with a black population of between 1% and 2%. The area of St. Louis County north of Interstate Highway 270, which includes Black Jack, is approximately 99% white." *Black Jack, supra,* at 1183.

In addition, the drive to incorporate the Black Jack area began as a result of HUD giving the developer of the units under construction a "green light" for federal funding. That drive resulted in incorporation of Black Jack on August 6, 1970 (two months after the announcement of federal funding). Within three months thereafter the city enacted a zoning ordinance prohibiting the construction of any new multiple family dwellings and making existing multiple family dwellings non-conforming uses.

Clearly this is a situation unlike that in the City of Toledo and just as clearly justifies a finding of discriminatory effect in the *Arlington Heights* "second sense." Such a finding is, of course, not justified by the facts in this case, and was specifically rejected by the Sixth Circuit.

In addition the Court in the *Black Jack* case found more than merely a discriminatory effect. The Eighth Circuit said:

> "The discriminatory effect of the ordinance is more onerous when assessed in light of the fact that segregated housing in the St. Louis metropolitan area was
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> '. . . in large measure the result of *deliberate racial discrimination in the housing market by the real*

estate industry and by agencies of the federal, state, and local governments. . . .'" (emphasis added) *Black Jack, supra,* at 1186.

All of which was stipulated to by the parties at trial.

The Eighth Circuit went on to say:

"Black Jack's action is but one more factor confining blacks to low-income housing in the center city, confirming the inexorable process whereby the St. Louis metropolitan area becomes one that "has the racial shape of a donut, with the Negroes in the hole and with mostly Whites occupying the ring." Mahaley v. Cuyahoga Metropolitan Housing Authority, 355 F. Supp. 1257, 1260 (N.D.Ohio, 1973), rev'd, 500 F.2d 1087 (6th Cir. 1974). *See also* Crow v. Brown, 332 F.Supp. 382, 384 (N.D.Ga., 1971), aff'd per curiam, 457 F.2d 788 (5th Cir. 1972). Park View Heights was particularly designed to contribute to the prevention of this prospect so antithetical to the Fair Housing Act. The Board of Directors of the Park View Heights Corporation was one-half white and one-half black. Affirmative measures were planned to assure that members of the black community would be aware of the opportunity to live in Park View Heights. There was ample proof that many blacks would live in the development, and that the exclusion of the townhouses would contribute to the perpetuation of segregation in a community which was 99 percent white." *Black Jack, supra,* at 1186.

That deliberate racial discrimination by the federal, state, and local government is the kind of circumstance required by the Seventh Circuit in *Arlington Heights* in addition to a mere discriminatory effect.

Not only is there no discriminatory intent in this case, such as was found to exist in *Black Jack,* but there is not even any discriminatory effect in any sense.

(3) Decision by the Third Circuit in Resident Advisory Board v. Rizzo, ... F.2d ..... (Third Cir. August 31, 1977).

Petitioners contend that the Sixth Circuit's decision in the instant case conflicts with that of the Third Circuit in *Rizzo, supra.*

Again petitioners totally fail to undertake any analysis of the facts of the *Rizzo* case. By contrast both the District and the Circuit Courts went into a lengthy factual analysis of the events leading up to the scuttling of the Whitman project. There are two major features of the *Rizzo* case which are not found in the instant case.

First, there was the most direct evidence of intentional discrimination by the City which it is possible to imagine. During the mayoral campaign of 1971, Frank Rizzo, who was subsequently elected mayor of Philadelphia, campaigned in opposition to public housing. Mayor Rizzo's testimony is summarized at considerable length in the opinion of the District Court [*Resident Advisory Board v. Rizzo,* 425 F. Supp. 987 at 1001, (1976)] which is quoted at length by the Third Circuit. The mayor testified that:

". . . he considered public housing to be the same as Black housing in that most tenants of public housing are Black (citations omitted). Mayor Rizzo therefore felt that there should not be any public housing placed in White neighborhoods because people in White neighborhoods did not want Black people moving in with them (citations omitted). Furthermore, Mayor Rizzo stated that he did not intend to allow PHA to ruin nice neighborhoods (citations omitted)." Slip Op. at 19.

Similar statements appear throughout Mayor Rizzo's testimony. The discriminatory intent on the part of the City could hardly be clearer.

Second, the activities of the City, the City's Housing Authority (PHA), and its Redevelopment Authority (RDA), had the effect of changing a previously racially mixed neighborhood into a virtually all white neighborhood. Thus the Third Circuit Court of Appeals found that:

> "Like other neighborhoods in urban America, Whitman has undergone a transformation in its racial composition over the past several decades. Unlike most, however, Whitman has changed from an originally racially mixed area to one which is virtually all-white. Moreover, this change has resulted almost wholly from the urban renewal efforts of the defendant governmental agencies.
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> As revealed by the district court's analysis, Whitman's present all-white population must be viewed against a backdrop of, on the one hand, a growing concentration of blacks and other minorities in discrete, insular sections of Philadelphia (North Philadelphia, West Philadelphia and South Central Philadelphia), and on the other, a reduction in the number of blacks residing in other parts of the city, including Whitman. The net result has been, in the words of the district court, that .[t]he City of Philadelphia is today a racially segregated city. 425 F.Supp. at 1006.'" Slip Op. at 8.

The activities of the City, its PHA, and RDA could be found to be a program not of Urban Renewal, but of "Negro removal" much as the Court found in the case of *Garrett v. Hamtramck*, 503 F.2d 1236 (Sixth Cir. 1974).

The Third Circuit went on to summarize the racially discriminatory impact of the activities of the City of Philadelphia, its PHA, and its RDA as follows, to wit:

> "Whereas originally almost 45% of the families living in the Whitman project area were black, by the time urban renewal clearance was completed and the surrounding blocks reconstructed, virtually no black families were to be found in the area. The evidence produced by the plaintiffs, which revealed that the urban renewal activities of the defendants had the result of removing black families from the Whitman site, leaving Whitman as an all-white community, was sufficient to establish a *prima facie* case of discriminatory effect. Nor can there be any doubt that the impact of the governmental defendants' termination of the project was felt primarily by blacks, who make up a substantial proportion of those who would be eligible to reside there." Slip Op. at 44.

The Court of course concluded that the totality of action by the defendants had a racially discriminatory effect, but even under the extreme circumstances present in that case concluded that "The mere showing of a racially discriminatory effect does not, however, necessarily constitute a violation of § 3604 (a)." Slip Op. at 45.

There is no similarity at all between the racially discriminatory intent of the City of Philadelphia and its mayor and the program of Negro removal by the City, its PHA, and its RDA on the one hand, and the situation under consideration in the instant case on the other.

C. THERE IS NO CONFLICT WITH PRIOR DECISIONS OF THIS COURT.

Petitioners contend that the Sixth Circuit's decision in the instant case conflicts with applicable decisions of

this Court. As hereinbefore mentioned, the plain fact is that the Sixth Circuit found that the governmental action in question did not have a racially discriminatory effect. Nowhere in their petition do petitioners attempt to analyze or set forth the holding of the Sixth Circuit in this case. Instead they state that ". . . *if* the Sixth Circuit *impliedly* held that the plaintiffs failed to prove '*intent*'. . . ." (Pet. p. 31) (our emphasis) and that "At best, the Court of Appeals *implicitly assumed* that plaintiffs' burden of proof under Title VIII . . . ." (Pet. p. 32) (our emphasis), and ". . . the Court of Appeals *presumably* ruled that because plaintiffs were challenging municipal exercises of land use authority . . . ." (Pet. p. 32) (our emphasis). Nothing in the Sixth Circuit's opinion justifies the implications, suppositions, and presumptions engaged in by petitioners. The plain fact is that the Sixth Circuit found there was no racially discriminatory effect in any sense. Since that is the case, the Sixth Circuit's decision does not conflict with the Title VII decisions of this Court and does not conflict with this Court's decision in *Arlington Heights, supra.**

The reference to the *Gautreaux* case demonstrates even more dramatically petitioners' failure to understand

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*It is interesting to note that petitioners engage in the same type of analysis of this Court's mandate to the Sixth Circuit. The mandate was simply that the Sixth Circuit give further consideration to the case in light of intervening decisions by this Court in *Arlington Heights* and *Gautreaux*. Yet petitioners state unequivocally that the mandate

> ". . . required the Court of Appeals to decide expressly at least the following questions: (1) whether plaintiffs' burden of proof under Title VIII is to prove only that the effect of the challenged conduct is racially discriminatory, or to prove a discriminatory 'intent' or 'purpose', before liability attaches; (2) if 'intent' must be shown, whether the plaintiffs satisfied the evidentiary standard for 'intent' outlined in *Arlington Heights*; and (3) if liability were found, whether, under the principles of *Gautreaux*, the District Court was authorized to order the defendants to develop a city-wide remedial plan to eliminate discriminatory barriers."

the holding of the Sixth Circuit. Since the Sixth Circuit found that there was no discriminatory effect, a consideration of relief and of whether the kind of relief granted in *Gautreaux* would be appropriate in this case is obviously inappropriate. In any event, this Court's remand to the Sixth Circuit for further consideration in light of the intervening decision in *Gautreaux* does not suggest disagreement with the Sixth Circuit's holding but instead does suggest disagreement with the District Judge's affirmative relief order. This Court contrasted its decision in *Gautreaux* with its decision in the case of *Milliken v. Bradley*, 418 U.S. 717 (1974) as follows:

> "In sum, there is no basis for the petitioner's claim that the Court-ordered metropolitan relief in this case would be impermissible as a matter of law under the *Milliken* decision. In contrast to the desegregation order in that case, a metropolitan relief order directed to HUD would not consolidate or in any way restructure local governmental units. The remedial decree would neither force suburban governments to submit public housing proposals to HUD, nor displace the rights and powers accorded government entities under federal or state housing statutes or existing land use laws. The order would have the same effect on the suburban governments as a discretionary decision by HUD to use its statutory powers to provide the respondents with alternatives to the racially segregated Chicago public housing system created by CHA and HUD."

In this case the remedial decree made by the District judge did require the local government to submit a public housing proposal to the District judge. In addition, the remedial decree made by the District judge would displace the rights and powers accorded local governmental en-

tities under existing land use laws. In fact, the District judge ordered the City Council to enact a change in the existing land use laws.

In *Gautreaux* the Supreme Court found a limitation which would prevent the making of a remedial order such as the District judge attempted to make here.

> "As we noted in part II *supra* the District Court's proposed remedy in *Milliken* was impermissible because of the limits on the federal judicial power to interfere with the operation of state political entities that were not implicated in unconstitutional conduct."

CONCLUSION

It is therefore respectfully submitted that the decision by the Sixth Circuit Court of Appeals in this case does not conflict with decisions in other Circuits and does not conflict with decisions of this Court and that, therefore, the Petition for Writ of Certiorari ought to be denied.

Respectfully submitted,

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